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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-

CLIFTON CHARLES RUSSELL, JR.,

Petitioner,

VERSUS

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals committed error of a constitutional magnitude in denying Petitioner's motion requesting a late preparation and filing of the transcription of the voir dire examination to pursue error in the trial court's exclusion of two prospective jurors contrary to Adams v. Texas, 448 U.S. 38 (1980), particularly considering that:

   A. Adams had not yet been decided at the time of the voir dire here; and

   B. Texas law at the time for designation of the appellate record precluded an Adams argument, Respondent having more than two unused peremptory challenges at the close of the voir dire?

2. Whether the majority of the Texas Court of Criminal Appeals constitutionally erred in failing to heed the dissent's warning that it is now necessary to define the word "deliberately" of punishment phase special issue number one to avoid the strong likelihood of the jury concluding that having previously determined that Petitioner intentionally caused the death of the deceased, that issue had already been answered adversely to Petitioner, considering this Court's expectation apparent in Jurek v. Texas, 428 U.S. 262, 270-274 and n. 7 (1976), that such special issue would be interpreted to guide the jury in its consideration of mitigating factors?

3. Whether the Constitution requires that the Texas death penalty scheme provide a procedure for proportionality review in accordance with Zant v. Stephens, U.S. (1983), particularly considering that Petitioner's co-defendant subsequently plead guilty on a plea bargain whereby punishment was assessed at 60 years confinement, while the record here does not indicate whether the death of deceased was directly caused by Petitioner's conduct alone, conduct of both Petitioner and co-defendant or conduct of the co-defendant alone?

4. Whether the Texas Court of Criminal Appeals constitutionally erred in summarily dismissing Petitioner's contention that the trial court erred in overruling his objection to special issue number two concerning probability of future dangerousness in the charge on punishment, in view of the following elements of this case:

A. The failure of the Texas Court of Criminal Appeals to subsequently interpret such issue to provide the jury guidance in considering mitigating evidence as anticipated in Jurek v. Texas, 428 U.S. 262, 272 (1976);

B. The reasoning of Jurek, supra, 428 U.S. at page 273, having substantial basis in a sole dissenting opinion of Furman v. Georgia, 408 U.S. 238, 400 (1976) (Burger, C. J., dissenting);

C. The mandatory juror oath of Texas Penal Code Section 12.31(b) which was not invalidated by Adams v. Texas, 448 U.S. 38 (1980); and

D. The presence of mitigating evidence in the record here similar to that deemed significant by this Court in Eddings v. Oklahoma, 455 U.S. 104 (1982)?

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PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Clifton Charles Russell, Jr., respectfully prays that a writ of certiorari issue to review the decision of the Texas Court of Criminal Appeals in this case.

CITATION TO OPINION BELOW:

The opinion of the Texas Court of Criminal Appeals is not yet reported and the slip opinion is annexed as Appendix A. Russell v. State, No. 66,410, slip op. (Tex. Cr. App. 1983). The postcard notification of that court denying Petitioner's motion for leave to file a motion for rehearing is annexed as Appendix B.

JURISDICTION:

Jurisdiction of this Court is invoked under 28 U.S.C. Section 7(3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. This case involves the Sixth Amendment of the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...;

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the Texas statutes defining capital murder, V.T.C.A., Penal Code Section 19.03; governing sentencing in capital cases, Vernon's Ann. C.C.P. Art. 37.071; requiring an oath of capital jurors, V.T.C.A., Penal Code Section 12.31(b); allotting the state and defense 15 peremptory challenges each in capital cases, Vernon's Ann. C.C.P. Art. 35.15; defining the term "intentionally", V.T.C.A., Penal Code Section 6.03(a); and defining murder, V.T.C.A., Penal Code Section 19.02, which are annexed as Appendix C.

STATEMENT OF THE CASE:

A. Course of Proceedings.

The Petitioner, Clifton Charles Russell, Jr., was charged in Taylor County, Texas, with the offense of capital murder, intentionally causing the death of Hubert Otha Tobey in the course of committing the offense of robbery in violation of V.T.C.A., Penal Code Section 19.03. He was convicted of capital murder on April 17, 1980, and, the following day, the jury answered special issues

one and two, Vernon's Ann. C.C.P. Art. 37.071, affirmatively thereby assessing the death penalty.

The Texas Court of Criminal Appeals affirmed the Petitioner's conviction and death sentence on July 6, 1983. Russell v. State, No. 66,410, slip op. (Appendix A), and rehearing was denied on September 28, 1983. Petitioner's MOTION FOR REHEARING in that Court is annexed as Appendix D.

Petitioner then on October 5, 1983, filed his APPLICATION FOR STAY OF EXECUTION with Mr. Justice White, pending a final disposition in this Court of this petition for writ of certiorari, which was granted by ORDER of Justice White dated October 12, 1983.

B. Facts Material to Questions Presented.

Despite Petitioner's efforts, as set forth in his MOTION FOR REHEARING (Appendix D), the record below does not contain a transcription of the voir dire proceedings pertinent to Question No. One.

As set forth in the opinion of the Texas Court of Criminal Appeals on direct appeal, Russell v. State, slip op. at 1-6 (Tex. Cr. App. 1983) (Appendix A), the following is a fair summary of the evidence presented at trial on the question of guilt. The deceased, Hubert Otha Tobey, worked at Abilene Municipal Airport on Sunday, December 2, 1979, from 4:00 p.m. until midnight. He was driving his wife's 1974 Lincoln Continental Mark IV automobile bearing Texas license plates MXM 997. The deceased had been issued three Save-A-$ Club gasoline credit cards for use at unmanned self-service stations. Insertion of a card would activate the gas pump and information concerning the transaction would be relayed via telephone wires to a computer which would record the details, including the date, time, place, amount of gasoline purchased and the number of the credit card. A computer programmer for the owner of the unmanned stations testified from computer printouts concerning the transactions of December 2, 1979. They

reflected that at 11:56 p.m. a card issued to the deceased was inserted in a pump at the station on South Seventh and Treadaway Streets in Abilene, but no gas was pumped. At 11:59 p.m. the same card was used at the same pump, reflecting that 20 gallons of gas were pumped.

An Abilene police officer testified that while on patrol at 12:50 a.m. on December 3, 1979, he observed a silver or gray Lincoln Continental bearing Texas license plates MXM 997 at a Minute Stop Grocery on East Highway 80. Near the vehicle was a white male identified as resembling Petitioner and a black male identified as resembling the co-defendant, William Battee, Jr.

The body of the deceased was discovered at an abandoned house at 526 Thomas Street in Abilene by a resident of the neighborhood. Police were then notified.

At approximately 2:00 p.m. on December 3, 1979, a police officer in Hobbs, New Mexico, investigated an illegally parked Lincoln Continental bearing Texas license MXM 997 and subsequently Petitioner, Battee and a hitchhiker, who were in the vicinity, were arrested for public intoxication.

A forensic serologist determined, from examining blood samples from the clothing of Petitioner, from Battee and from the deceased, that the blood on Petitioner's clothing was neither his nor Battee's, but was compatible with that of the deceased. A footprint found at the gas station where the credit card was used matched a footprint found at 526 Thomas Street where the body was discovered, and matched the tennis shoes worn by Battee when arrested. [1]

The court below also found, as to its holding that the evidence

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[1] Not mentioned in the reported opinion is the testimony of the same forensic serologist that blood on one of Battee's tennis shoes was also compatible with that of the deceased (S.F. 514-515).

was sufficient to support the jury's affirmative answer to special issue number two at the punishment phase concerning the probability of future dangerousness, that despite the absence of psychiatric testimony, the facts of the instant case revealed a brutal murder committed during the course of a robbery. "When the facts of the instant offense are considered with the additional evidence of the extraneous robbery, the beating in jail and appellant's reputation, we conclude the evidence is clearly sufficient to support the jury's finding of 'yes' to the second special issue." Russell v. State, slip op. at 19, 20.

The opinion below failed to mention that Petitioner was 18 years of age at the time of the offense (S.F. 728) and had no prior felony conviction (S.F. 660). Also absent from that opinion is any reference to the following excerpts from the testimony of Petitioner's mother, Jo Ann Lacy:

> Q. Okay. Was there any particular thing that caused you to move from Centerville to Abilene?
>
> A. Yes. My husband took a ball bat to my son and broke him up, and I had to carry him to the Galveston hospital.
>
> Q. When you say he "broke him up", exactly what happened?
>
> A. He broke his face up with a ball bat. They had to do surgery on him in Galveston and repair it.
>
> Q. Okay. Was it a serious injury, or were the doctors able to say it was superficial, or what?
>
> A. Well, he underwent surgery, and his leg was damaged, and his face was broken up quite a bit.
>
> . . .
>
> Q. Okay. Now, when-- Your husband is R. C. Lacy; is that correct?
>
> A. Yes.
>
> Q. When he hit Junior, at that particular time, was there anything that caused that action to come about?

A. Not that-- There hadn't been any fighting between them. There had been some words, but no fighting.

Q. Okay. What did they have words about?

A. He had shot me.

Q. Who had shot you?

A. My husband.

Q. Was this at this time that--

A. No. It was before that.

Q. How long before?

A. It was approximately nine months before he had hurt my son.

Q. Okay. What was there about being shot nine months before that caused your husband to attack Charles Russell?

A. Well, my son asked him why he had shot me, because my husband told him that it was accidental. And Junior, my son, wanted to know why he had shot at me three times if it was accidental; why he had shot the gun at me three times without shooting me. And then, when he had hit me, it was the third shot that hit me. And he wanted to know, if it was accidentally, why the gun went off accidentally three times.

...

Q. When the fight broke out between Junior and your husband, who started that fight?

A. There wasn't any fight to it. He walked up behind my son and hit him from behind with a ball bat. There wasn't no fight to it.

Q. Where was Junior at that time?

A. He was sitting on the picnic table in the yard.

Q. Was he by himself?

A. My stepson, my youngest stepson, was in the yard with him at the time.

...

Q. Okay. What did Mr. Lacy do then?

A. I tried to stop him, and he hit me with the ball bat, and I seen I couldn't stop him. I went in the house after a gun.

Q. Okay. And where did Mr. Lacy go?

A. He followed me inside, and he-- When the gun misfired, he hit me with the bat.

Q. Did you point the gun at him or anything like that?

A. Yes, I did.

Q. Did the gun go off?

A. No.

...

Q. Did you keep the gun?

A. No. When he hit me with the bat, he took the gun away from me.

Q. Where did he hit you with the bat?

A. In the head.

...

Q. Okay. How old was Junior when this happened?

A. He had just turned 18. This happened on the 26th of August, and he turned 18 on the 5th of August.

...

Q. Okay. Now, prior to the time that Junior was living with you in Centerville when this occurred, where was Junior before that?

A. He was in Gatesville.

Q. Okay. How long had he been in Gatesville?

A. He had been there a year, the last time.

...

Q. Okay. Mrs. Lacy, how old a lady are you?

A. I'm 38.

Q. All right. When were you first married?

A. I was married when I was 15.

Q. Okay. Who did you marry at that time?

A. Joseph Leroy Higgins.

...

Q. Okay. Was that Junior's father?

A. No.

Q. Okay. Did you divorce him, or what?

A. Yes. We were divorced. He went to the penitentiary from here.

Q. Okay. Did you later remarry or anything?

A. No. I didn't marry again until I married R. C. in '71.

Q. Okay. Was R. C. Lacy Junior's father?

A. No, he isn't.

Q. Who is Junior's father?

A. His name is Andy Booker.

Q. Okay. Does Mr. Booker live here in Abilene?

A. I don't know where is is at now.

...

Q. Okay. During the time that you lived with Andy Booker, did he show much interest in Junior?

A. Andy never seen Junior till he was seven years old.

Q. Did he know he had a son?

A. He knew I was pregnant with the baby. He knew when the baby was born. But he was married to another woman, and they had children of their own.

Q. Okay. So during this period of time, did Junior have any kind of father-figure that was in the house, or anything like that?

A. No.

...

Q. During the time that Junior was growing up, how would you describe his home environment?

A. Junior was raised hard. We-- It's not easy to raise a mixed child, especially since the civil rights bill wasn't passed. He didn't get a whole lot of what other children have.

Q. Did Junior attend school while he he was growing up, or what?

A. Yes. He attended school, but not regularly.

Q. Did he-- Who did he-- Who were his friends while he was growing up, as a child?

A. Well, William Battee was a friend of his. And that's about the only one that he ever was real friends with. He stayed mostly with me.

...

Q. Mrs. Lacy, how many times have you been married?

A. Twice.

Q. Have you ever lived with someone that you were not married to?

A. Yes.

Q. During that period of time, was Junior living with you, too?

A. Yes, he was.

...

Q. Did, in fact, any of these men resent Junior, or express that resentment to you?

A. Yes.

Q. Did Junior know about that resentment?

A. I don't know. If he did, I wasn't aware of it.

Q. Now, has Junior, aside from the time he may have been in Gatesville, for instance, has he always lived with you?

A. No. He went to-- I put him out to Abilene Boys Ranch just before he was nine years old.

Q. Okay. How did that come about?

A. Well, I was sick, and I didn't have a place for him to stay, and I couldn't support him, and I knew Mr. and Mrs. Richie would take care of him. So I called them and I asked them if they would come and take him and take care of him until I could come after him.

...

Q. During the time that Junior was growing up, do you feel like he ever received any kind of structured or controlled environment?

A. No, he didn't. He was with me quite a bit, most of the time. And I tended to give in to him because of the way I was living with him. I guess I felt I needed to show him more love and affection, or try to make up for the things that I wasn't able to give him. In order to do that, I over protected him and let him have his way about a lot of things.

Q. When you say that he was with you quite a bit, do you know of a place, or remember a Willie Whitney's Place or anything like that?

A. Yes, I do know Willie Whitney's.

Q. What kind of place is that?

A. It's an after-hours club. It's a bootleg club.

Q. Okay. And did Junior ever have occasion to be at that club during when he was growing up?

A. Junior's been in and out of there, and places like that, most of his life.

...

(S.F. 723-736)

Within two weeks of the jury's verdict assessing Petitioner's punishment at death, the co-defendant, William Battee, Jr., plead

guilty before the judge of the 104th District Court of Taylor County, Texas, to the lesser included offense of murder of Hubert Otha Tobey and was sentenced to 60 years confinement. Certified copies of the indictment, waiver of jury trial, stipulation of evidence, judgment and sentence in State of Texas v. William Battee, Jr. are annexed as Appendix E.

C. How the Federal Questions were Raised and Decided Below.

1. Petitioner's MOTION FOR REHEARING in the Texas Court of Criminal Appeals (Appendix D), sets forth the posture in which Question No. One comes before this Court. Petitioner's MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS is annexed as Appendix F and the order of the Texas Court of Criminal Appeals denying such motion is annexed as Appendix G. The opinion below thus does not deal with the exclusion of two prospective jurors contrary to Adams v. Texas, 448 U.S. 38.

2. The majority opinion below noted that Petitioner "contends the court 'erred in failing to respond to appellant's timely requested charge, and instruction to the jury at the punishment phase defining 'deliberate'.' Reference is made to Special Issue No. 1." The majority opinion then set out Petitioner's requested definition of "deliberate" in full and held that the trial court's refusal to submit that definition or any definition of "deliberate" to the jury was not error. Russell v. State, slip op. at 15-18 (Appendix A).

3. Question No. Three as to the constitutional necessity of the Texas death penalty scheme providing a procedure for proportionality review was not raised below.

4. As to special issue number two's inquiry into the probability of future dangerousness and Petitioner's trial court objection to the inclusion of that issue in the charge on punishment, the following is the response of the court below in its entirety:

Appellant complains the court failed to respond to his objection to the inclusion of Special Issue No. 2 in the charge on punishment since the provision relating to said special issue is unconstitutionally vague. The contention is overruled. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Collins v. State, 548 S.W.2d 368 (Tex.Cr.App. 1976); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr.App. 1980). See also Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1976).

No error is shown. Russell v. State, slip op. at 15 (Appendix A).

REASONS FOR GRANTING THE WRIT:

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE TEXAS COURT OF CRIMINAL APPEALS COMMITTED ERROR OF A CONSTITUTIONAL MAGNITUDE IN DENYING PETITIONER'S REQUEST FOR A LATE FILING OF THE TRANSCRIPTION OF THE VOIR DIRE TO PURSUE ERROR IN THE TRIAL COURT'S EXCLUSION OF TWO PROSPECTIVE JURORS CONTRARY TO ADAMS V. TEXAS, 448 U.S. 38 (1980).

In denying Petitioner's MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS (Appendices F and G), the Texas Court of Criminal Appeals implicitly sanctioned the procedure previously condemned by this Court in Adams v. Texas, 448 U.S. 38 (1980), in which the majority reasoned:

> As an initial matter, it is clear beyond peradventure that Witherspoon[2] is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their view about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out.
>
> Id. at 448 U.S. 47,48.

This Court in Adams then concluded that Section 12.31(b) (Appendix C) was indeed applied to exclude prospective jurors on grounds impermissible under Witherspoon, and that such application could not stand under the Sixth and Fourteenth Amendments. Id. at 49. Since Adams, the Texas Court of Criminal Appeals has indicated its understanding that the holding there does not eliminate the Section 12.31(b) oath because "the application of Section 12.31(b) that is required by Adams and Witherspoon calls for a determination of not merely whether the mandatory penalty would 'affect' his deliberations, but rather the extent to which the juror would be affected." (citing Witherspoon, supra, 391 U.S. at 522, n.21) Graham v. State, 643 S.W.2d 920, 923-924 (Tex. Cr. App. 1983)

Petitioner's motion requesting the late inclusion of the voir dire examination in the record on appeal clearly establishes

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[2] Witherspoon v. Illinois, 391 U.S. 510 (1968).

that such omission from the record cannot be attributed to any negligence or waiver on his behalf. At the time of the voir dire examination, Adams had not been decided. At the time for designating the record on appeal, Texas law, exemplified by cases such as Chambers v. State, 568 S.W.2d 313 (Tex. Cr. App. 1978), held that even in capital cases the improper exclusion of one prospective juror does not result in reversible error when the state fails to exercise at least one of its peremptory challenges. Chambers, supra, at 321. Such was the situation at the conclusion of the voir dire here.[3] Subsequently, Grijalva v. State, 614 S.W.2d 420 (Tex. Cr. App. 1980) overruled Chambers, holding that if a prospective juror is improperly excluded on challenge for cause by the state in a capital case, the fact that the state has peremptory challenges remaining at the conclusion of the voir dire does not render such error harmless. Certiorari is appropriate because Petitioner's valid Adams contention that two prospective jurors were improperly excused under 12.31(b) on a basis broader than permitted by Witherspoon must be subject to proper and adequate appellate review.

Indeed, Griffin v. Illinois, 351 U.S. 12 (1956) holding that the denial of an indigent defendant an effective means of seeking appellate review of his conviction is a denial of Equal Protection under the Fourteenth Amendment, and North Carolina v. Pearce, 395 U.S. 711 (1969) holding that upon retrial after reversal of a conviction a judge can only impose a more severe sentence based on events occurring subsequent to the first trial, both symbolize this Court's concern that the right to appeal a conviction, once granted, should not be unduly limited or restricted in individual cases.

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[3]Petitioner's assertion that the state failed to exercise more than two of its allotted 15 peremptory challenges (Art. 35.15 in Appendix C), of course, cannot be supported by the record, since the failure of the record to contain a transcription of the voir dire is the gist of this complaint.

If a provision has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581 (1968). Once granted, an individual's right to appeal a conviction should not be restricted vis-à-vis others similarly situated and "either the defendant or his assigned counsel must be enabled to show that the grounds for seeking an appeal from the judgment of conviction are not frivolous and do not justify the finding that the appeal is not sought in good faith... It is essential, however, that he be assured some appropriate means- such as the district judge's notes or an agreed statement by trial counsel- of making manifest the basis of his claim..." Johnson v. United States, 352 U.S. 565, 566 (1957) (emphasis supplied); cf., Eaton v. City of Tulsa, 415 U.S. 697 (1974). Moreover, this Court's concern with insuring effective appellate review has not been limited to situations involving some restriction on that right as a result of the defendant's indigency. Chessman v. Teets, 354 U.S. 156 (1957) held that it was a denial of Due Process to permit the transcript there to be settled after the death of the original court reporter, without the presence of either defendant or counsel.

> Under the circumstances...we must hold that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process... By no means are we to be understood as saying that the state record has been shown to be inaccurate or incomplete. All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand.
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> Id. at 354 U.S. 162-164.[3a]

The substitution of Texas for California in the foregoing would aptly describe Petitioner's dilemma here. Indeed, the court below has recognized elsewhere that "when an appellant, through no fault of his or his counsel's, is deprived of a part of the statement of

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[3a] See also, U.S. v. Sheppard, 33 Cr. L. 2101 (E.D. Va. April 1, 1983)

facts which he diligently requested, the appellate court cannot affirm the conviction." Austell v. State, 638 S.W.2d 888, 890 (Tex. Cr. App. 1982).

Surely it cannot be claimed under any rational view of due process that our failure to anticipate the overruling of Chambers v. State, supra, by Grijalva v. State, supra, amounted to any form of lack of diligence. Finally, and most significantly, since "the penalty of death is qualitatively different from a sentence of imprisonment, however long..." and because of that difference "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), it follows that in capital cases where death is assessed the Constitution mandates "...the existence of...important procedural safeguard(s)... to avoid arbitrariness and to assure proportionality." Zant v. Stephens, U.S. , 103 S.Ct. 2733, 77 L.Ed.2d 235, 258 (1983); see generally, Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) as to the overriding importance of complete and thorough appellate review in capital cases.

In sum, there can be no rational analysis based on the opinions of this Court since Furman and its progeny that would support any argument to the effect that Petitioner has no right to adequate and thorough appellate review of the proceedings by which the jury that found he should die was selected. The constitutional necessity of assuring adequate and thorough appellate review of such cases makes the present case particularly appropriate for the exercise of certiorari jurisdiction.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE MAJORITY OF THE TEXAS COURT OF CRIMINAL APPEALS CONSTITUTIONALLY ERRED IN FAILING TO HOLD IT NECESSARY TO DEFINE THE WORD "DELIBERATELY" OF SPECIAL ISSUE NUMBER ONE.

Once a Texas jury has found a defendant guilty of capital murder, the punishment inquiry focuses upon two mandatory questions

to which the jury must return an affirmative answer upon a finding beyond a reasonable doubt, before death can be assessed. Special issue number one contained in Vernon's Ann. C.C.P. Art. 37.071(b)(1) (Appendix C), inquires of the jury as follows:

> whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result

That punishment phase issue is, of course, asked the jury after the jury by its verdict of guilty has already determined, as for example in the instant case, that the Petitioner intentionally or knowingly caused the death of the deceased and that he intentionally caused the death during the course of committing robbery. "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." V.T.C.A., Penal Code Section 6.03(a) (Appendix C). See also, V.T.C.A., Penal Code Section 19.02 (murder) (Appendix C) and V.T.C.A., Penal Code Section 19.03(a)(2) (capital murder) (Appendix C), as well as relevant portions of the trial court's charge on guilt (Tr. 129-137) and charge on punishment (Tr. 139-140).

It is well to remember that against that statutory backdrop, this Court noted in Jurek v. Texas, 428 U.S. 262 (1976) that "The Texas Court of Criminal Appeals has not yet construed the first (deliberately) and third questions...thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry." Id. at 428 U.S. 272, n. 7. As succinctly concluded by the well-reasoned dissent below:

> It has come to this Court's attention from numerous and diverse sources that the term "deliberately" as employed in the first special punishment issue in our statutory capital murder scheme has created a great deal of confusion, calling into question the reliability

> of jury findings made thereon. See n.8, ante, and accompanying text. It is now unreasonable to assume that jurors will be able to determine the issue reliably without further assistance when legal scholars and members of the bench and bar have debated the subject continuously for more than seven years. The meaning of the word "deliberately" is now settled; thus, assistance to the jury is available. Accordingly, we should now employ that power reserved to us by the Supreme Court in Jurek, supra, and hold that upon timely request by a capital murder defendant or the State, that party is entitled to have the jury instructed at the punishment phase to the effect of the following:
>
> (1) as employed in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally", as that word was previously defined in the charge on guilt, and
>
> (2) instead, as employed in the first special issue, the word "deliberately" means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences, willful, slow, unhurried and steady as though allowing time for a decision.
>
> In the instant case though the appellant requested it, the jury was not instructed in any fashion upon the meaning of "deliberately" and how it differs from the meaning of "intentionally". Having determined such an instruction is essential to the reliability of the jury's arbitration of that issue submitted at punishment in capital cases, I would hold it was prejudicial error to deny such guidance in this case.
>
> Russell v. State, slip op. at 13-15 (Clinton, J. dissenting) (Appendix A) (footnote omitted).

The apt reference above to the ongoing debate concerning "deliberately" among legal scholors, bench and bar, is additionally clarified by the following:

> Consider the first question the jury must answer-whether the defendant's conduct was deliberate and engaged in with the reasonable expectation that death would result. The jury which encounters this question will have already decided that the defendant knowingly or intentionally engaged in the conduct forming the basis of his prosecution. In order for a jury to answer the first sentencing question in the negative, it must be able to distinguish between conduct that is knowing or

> or intentional and conduct that is deliberate or which an individual may reasonably expect to produce certain results. While such distinctions among modes of conduct might make a nice question for a law school examination, it is questionable whether any jury, or even any lawyer or judge, can find the defendant guilty of intentional murder, but then say it was not deliberately committed, without contradicting itself. Scofield, Due Process in the United States Supreme Court and the Death of the Texas Capital Murder Statute, 8 Am. J. Crim. Law 1, 26-27 (1980).

In fact, "In many cases, there is a likelihood that the jury may not make a great distinction between deliberation and the mens rea of the offense..." and that "In common sense terms, it would seem that capital punishment should be confined to those kinds of homicides that are not only intentional but also cold-blooded. It is precisely that objective that the deliberation question is designed to accomplish. In any event, it seems likely that the deliberation issue will be before the court again, since it is an issue that is central to the legitimate use of capital punishment." Crump, Capital Murder: The Issues in Texas, 14 Hous. L. Rev. 531, 551, 555 (1977). That the court below has not dealt with the deliberation issue in any manner designed to provide the jury with proper guidance is best illustrated by its noting in Blansett v. State, 556 S.W.2d 322 (Tex. Cr. App. 1977) that "a jury having found that a defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done."[4] Id. at 556 S.W.2d 327, n. 6 (emphasis supplied). The majority opinion below further exemplifies the attendant confusion surrounding the deliberateness inquiry by its statement that "Where terms used are words

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[4]Still, since Blansett, the Texas Court of Criminal Appeals has stated, in a different context, that the terms "intentionally" and "deliberately" are not linguistic equivalents. Heckert v. State, 612 S.W.2d 549, 552-553 (Tex. Cr. App. 1981). That, however, does not relieve the problem of relying on jury nullification to avoid a sentence of death in cases where it is not warranted as recognized in Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily (sic) to be defined in the charge to the jury." Russell v. State, slip op. at 17 (Appendix A) (citations omitted). That there is no significant distinction between an intentional killing and a deliberate killing in Texas insofar as guidance for the jury at the punishment phase is thus beyond dispute.[5]

The confusion surrounding the deliberateness inquiry is, alone, sufficient to require a definitional instruction in order to avoid this Court's characterization of special issue number one as an inquiry which results in "The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." Godfrey v. Georgia, 446 U.S. 420, 429 (1980). When considered in the context of this Court initially questioning the propriety of mandatory death penalties in Furman v. Georgia, supra, 408 U.S. at 257 (Douglas, J. concurring) and the subsequent resounding condemnation of any such mandatory scheme in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), the undefined deliberateness inquiry of special issue number one cannot withstand constitutional muster since its effect is

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[5] In fact, the Texas Court of Criminal Appeals held in Wilder v. State, 583 S.W.2d 349 (Tex. Cr. App. 1979) that the evidence was sufficient to sustain the jury's finding that death was caused deliberately, notwithstanding that the co-defendant in question, Armour, did not actually kill the victim as he was a nontriggerman driver of the getaway car, stating "Armour alleges that the evidence was insufficient under Article 37.071, V.A.C.C.P. to show he either caused the death of the deceased or committed the act deliberately and with the reasonable expectation that death would result because he did not actually kill the deceased... The evidence introduced clearly shows that Armour was a party to the offense. He was, in effect, the 'wheel man'." Id. at 583 S.W.2d 356. That type of analysis underlying the affirmance of Armour's death sentence has been, of course, subsequently condemned by this Court in Enmund v. Florida, U.S. , 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

tantamount to mandating a sentence of death. The necessity of insuring that no statutory death penalty scheme results in effectively mandating a death sentence requires, in short, that certiori be granted. The fact that research reveals no Texas case holding that the evidence was insufficient to sustain the jury's affirmative answer to the deliberateness inquiry further validates that conclusion. See generally, annotation number 43 under Vernon's Ann. C.C.P. Art. 37.071. (Appendix C)

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE CONSTITUTION REQUIRES THE TEXAS DEATH PENALTY SCHEME TO PROVIDE PROPORTIONALITY REVIEW.

As shown by the annexed certified copies of the indictment, waiver of jury trial, stipulation of evidence, judgment and sentence in State of Texas v. William Battee, Jr. (Petitioner's co-defendant) (Appendix E), the instant case provides a particularly suitable vehicle for the granting of certiorari to analyze the question of proportionality review as it pertains to the Texas scheme. Within two weeks of Petitioner's death sentence, Battee plead guilty to intentionally and knowingly causing the death of Hubert Otha Tobey on December 3, 1979, under a plea bargain whereby the judge assessed sentence at 60 years confinement (stipulation of evidence and sentence - Appendix E), although the record here does not indicate whether the death of Hubert Otha Tobey was directly caused by Petitioner's conduct alone, conduct of Petitioner and Battee or conduct or Battee alone. See generally, B. Facts Material to Questions Presented, supra, particularly footnote 1 thereunder.

Furman v. Georgia, 408 U.S. 238 (1972) first recognized that proportionality is a significant constitutional consideration in death penalty cases by the statement that "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id. at

408 U.S. 310 (Stewart, J. concurring). Later, this Court's approval of the Georgia death penalty scheme was based in large measure upon the finding that it provided appellate review as to whether a death sentence "is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Gregg v. Georgia, 428 U.S. 153, 167 (1976). See also, Proffitt v. Florida, 428 U.S. 242, 260 (1976). This Court's approval of the Georgia scheme as a result of its provision for proportionality review was recently reiterated in Zant v. Stephens, U.S. , 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), stating "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality...we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances." Id. at 77 L.Ed.2d 258. Recognizing the constitutional necessity of proportionality review, the Ninth Circuit in Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), remanded petitioner's habeas corpus petition to enable the California Supreme Court to undertake proportionality review, reasoning:

> A plurality of the United States Supreme Court has approved proportionality review whether such is provided by statute...or by case law... The Supreme Court has discussed proportionality concerning the death penalty in at least two ways. First, in several instances the Court has examined whether the death penalty was proportionate to the crime for which it was imposed... Second, the Court has examined whether the penalty in the case was proportionate to other sentences imposed for similar crimes...
>
> Therefore, we must vacate the district court's denial of the petition and instruct the district court to grant the petition relieving petitioner from his sentence of death unless the California Supreme Court undertakes, within a reasonable

> time not to exceed 120 days from the date this order is filed, the determination of whether the penalty in this case is proportionate to other sentences imposed for similar crimes.
>
> Id. at 692 F.2d 1196.

Concerning appellate review of death penalty cases in Texas, Art. 37.071(f) (Appendix C) merely provides for expedited review of cases in which the death sentence is assessed. Texas has no proportionality review.[6]

One would be hard put to conceive more compelling circumstances for proportionality review than the instant case. If proportionality is to have meaning at all, and if this Court's condemnation of death penalty schemes that permit the "wanton and freakish" imposition of death is to remain viable, then the Constitution must not allow the execution of Petitioner while his co-defendant lives, without any showing of a substantial difference as to degree of involvement in the death of Hubert Otha Tobey. The exercise of certiorari jurisdiction is necessary to prevent that result.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER OVERRULING THE PLURALITY HOLDING OF JUREK V. TEXAS, 428 U.S. 262 (1976) THAT SPECIAL ISSUE NUMBER TWO CONCERNING THE PROBABILITY OF FUTURE DANGEROUSNESS ADEQUATELY GUIDES THE JURY IN ITS CONSIDERATION OF MITIGATING EVIDENCE AS PRESENTED HERE.

After concluding that the Texas death penalty scheme[7] facially provided for the jury's consideration of aggravating factors, a plurality of this Court in Jurek v. Texas, 428 U.S. 262 (1976) examined the constitutional sufficiency of the scheme concerning the jury's consideration of mitigating factors. The plurality opinion recognized at the outset that:

> A sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that

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[6] See n.5, supra.

[7] V.T.C.A., Penal Code Section 19.03; Vernon's Ann. C.C.P. Art. 37.071; and V.T.C.A., Penal Code Section 12.31(b) (Appendix C).

> we today have held in Woodson v. North Carolina... to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today held unconstitutional in Woodson and Roberts (Stanislaus) v. Louisiana ... A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances... the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.
>
> The second Texas statutory question (Vernon's Ann. C.C.P., Art. 37.071(b)(2) - Appendix C) asks the jury to determine 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society.' In the present case, however, it indicated that it will interpret this second question so as to allow the defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show.
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> Id. at 428 U.S. 271-272 (emphasis supplied) (footnotes and citations omitted).

Any analysis of the response of the Texas Court of Appeals to the expectation of Jurek that special issue number two would be interpreted to allow the jury's consideration of mitigating factors must begin with an examination of the opinion below as it pertains to that issue. In disposing of Petitioner's arguments that special issue number two is unconstitutionally vague and that the evidence was insufficient to support the jury's affirmative answer to it, that court's entire response was as follows:

> Appellant complains the court failed to respond to his objection to the inclusion of Special Issue No. 2 in the charge on punishment since the provision relating to said special issue is unconstitutionally vague. The contention is overruled. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (additional citations omitted).
>
> No error is shown.

> Appellant makes claim that the evidence is insufficient to support the affirmative finding at the penalty stage of the trial as to Special Issue No. 2 as to the probability of future criminal acts of violence.
>
> It is well established that the circumstances of the offense itself can sustain an affirmative answer to the second special issue under Article 37.071, supra, if they are severe enough. (citations omitted) The jury, at the penalty stage of the trial, may consider all of the evidence adduced at the guilt stage of the trial. Indeed, the circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue submitted at the penalty stage of a capital murder case. (citations omitted)
>
> The facts in the instant case reveal a brutal murder committed during the course of a robbery. In addition to numerous knife wounds to the body, including one to the jugular vein, the deceased's skull was crushed by a piece of concrete. The deceased's money and automobile were taken. Jose Gonzales, nine days earlier, had also been attacked and beaten, and his truck taken. There was also testimony that after being confined in the Taylor county jail appellant beat another inmate. There was testimony from several witnesses that appellant's general reputation for being a peaceful and law-abiding citizen was bad, and that in their opinion he would continue to commit acts of violence in the future.
>
> There was no psychiatric testimony, but it is not essential to support an affirmative finding to the special issue in a capital murder case. (citations omitted)
>
> When the facts of the instant offense are considered with the additional evidence of the extraneous robbery, the beating in jail and appellant's reputation, we conclude the evidence is clearly sufficient to support the jury's finding of "yes" to the second special issue. (citations omitted)
>
> Russell v. State, slip op. at 15, 18-20 (Appendix A).

That the opinion below did not even mention,[8] much less deal with, evidence that Petitioner had no prior felony conviction, was eighteen years of age at the time of the offense and had endured

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[8] See generally, B. Facts Material to Questions Presented, supra, and particularly the excerpts from the testimony of Petitioner's mother therein.

a very cruel, deprived and unstable childhood affirms that the Texas Court of Criminal Appeals has attached no significance to the sort of mitigating evidence deemed significant in Eddings v. Oklahoma, 455 U.S. 104 (1982).[9] There, at the sentencing hearing, in seeking the ensuing death sentence, the state alleged that the murder was especially heinous, atrocious or cruel; that the crime was committed to avoid or prevent a lawful arrest; and that there was a probability Eddings would commit criminal acts of violence that would constitute a continuing threat to society. Id. at 455 U.S. 106, 107. At that same hearing "Eddings presented substantial evidence...of his troubled youth..." indicating that he "had been raised without proper guidance. His parents were divorced when he was 5 years old, and until he was 14, Eddings lived with his mother without rules or supervision..." Apparently, his "mother was an alcoholic and possibly a prostitute" ... and "(b)y the time Eddings was 14 he no longer could be controlled, and his mother sent him to live with his father..." who "...overreacted and used excessive physical punishment..." Id. at 455 U.S. 107. "(T)he trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the State had proved each of the three alleged aggravating circumstances beyond a reasonable doubt. Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a mitigating factor of great weight"... but "would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance..." Id. at 455 U.S. 108, 109 (footnote omitted). "The (Oklahoma) Court of Criminal Appeals affirmed the sentence of death..." (citation omitted) ...finding "that each of the aggravating circumstances alleged had been present. It cited the mitigating

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[9] See generally, Benson, Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity, 23 South Texas L.J. 315 (1982).

evidence presented by Eddings in some detail, but in the end it agreed with the trial court that only the fact of Eddings' youth was properly considered as a mitigating circumstance.." Id. at 455 U.S. 109 (footnote omitted). The only significant difference between the mitigating evidence here and that in Eddings is that here Petitioner's mitigating evidence was not even recited by the opinion below. See footnote 8, supra. Despite the extremely relevant mitigating evidence presented in the trial court below of beatings by a stepfather, resentment toward Petitioner by that stepfather and another stepfather who subsequently served time in the penitentiary, and despite evidence of Petitioner's violent family background in general, the court below, due in large measure we submit to the restrictive language of special issue number two, simply failed to attach any significance to those mitigating circumstances. See footnote 8, supra. Additional evidence was presented that Petitioner's true father never even saw him until he was seven years of age, that "Junior (Petitioner) was raised hard. We... It's not easy to raise a mixed child, especially since the civil rights bill wasn't passed. He didn't get a whole lot of what other children have." See footnote 8, supra, particularly the excerpted testimony of Petitioner's mother, Jo Ann Lacy, also found at S.F. 723-736, who most tellingly got to the crux of Petitioner's violent and unstable background in response to questioning about "Willie Whitney's Place" and other "bootleg" clubs, stating "Junior's been in and out of there, and places like that, most of his life." Id. at 736. Does the second inquiry of the sentencing jury of whether there is a probability that Petitioner "would commit criminal acts of violence that would constitute a continuing threat to society" (Appendix C) provide the jury any guidance in considering such mitigating circumstances? We submit that it most definitely does not as evidenced by the foregoing portions of the opinion below.

In remanding to the Oklahoma courts the death sentence imposed on Monty Lee Eddings for consideration of mitigating evidence similar to that presented here, this Court firmly enunciated the controlling rule of constitutional law as it has evolved during the post-Furman era.[10] holding:

> In Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 793, 98 S.Ct. 2954, 9 Ohio Ops 3d 26 (1978), Chief Justice Burger, writing for the plurality, stated the rule that we apply today:
>
> > "(W)e conclude that the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 57 L.Ed.2d 973, 98 S. Ct. 2954, 9 Ohio Ops 3d 26 (emphasis in original)...
>
> Beginning with Furman, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused. Thus, in Gregg V. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), the plurality held that the danger of an arbitrary and capricious death penalty could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Id. at 195, 49 L.Ed.2d 859, 96 S.Ct. 2909. By its requirement that the jury find one of the aggravating circumstances listed in the death penalty statute, and by its direction to the jury to consider "any mitigating circumstances," the Georgia statute properly confined and directed the jury's attention to the circumstances of the particular crime and to "the characteristics of the person who committed the crime..." Id. at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909.
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> Similarly, in Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976), the plurality held that mandatory death sentencing was not a permissible response to the problem of arbitrary jury discretion. As the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental

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[10] Jurek v. State, 522 S.W.2d 934, 940 n.8 (Tex. Cr. App. 1975).

> respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 52 L.Ed.2d 637, 97 S.Ct. 1993, 5 Ohio Ops 3d 252 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976).
>
> Thus, the rule in Lockett followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," Gregg v. Georgia, 428 U.S. at 197, 49 L.Ed.2d 859, 96 S.Ct. 2909, the rule in Lockett recognizes that "justice...requires ...that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania v. Ashe, 302 U.S. 51, 55, 82 L.Ed. 43, 58 S.Ct. 59 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency...
>
> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Eddings v. Oklahoma, supra, 455 U.S. 110-115 (footnote omitted).

Had the court below engaged in the analysis demanded of the Oklahoma courts, the reasons necessitating the exercise of certiorari jurisdiction here would be less compelling. A brief review of some of the more illustrative decisions of the Texas Court of Criminal Appeals concerning special issue number two will demonstrate that

neither the issue itself nor the court below has provided Texas juries any guidance for consideration of mitigating circumstances.

Hovila v. State, 562 S.W.2d 243, 249 (Tex. Cr. App. 1978) held that the trial court did not commit reversible error when it excluded punishment phase evidence "that Hovila did not murder or commit other criminal acts during a four-day period" when he had mistakenly been released from jail. See also, Duffy v. State, 567 S.W.2d 197, 208 (Tex. Cr. App. 1978); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Cr. App. 1978); Demouchette v. State, 591 S.W.2d 488, 492 (Tex. Cr. App. 1979); and Russell (James) v. State, 598 S.W.2d 238, 255 (Tex. Cr. App. 1980). In each of those decisions, upon challenge from appellant, the court below held that the evidence was sufficient to support the jury's affirmative finding that the appellant "would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 (b)(2), supra, (Appendix C). In each decision the court below emphasized the guilt-stage evidence concerning the offense and noted that there had been no evidence that the appellant was under mental or emotional pressure.[11] Contrary to the demonstrated practical effect of special issue number two as to jury guidance, the gist of this Court's death penalty decisions in the "post-Furman era" is that such guidance must be provided to focus the jury's attention on both the offense and the offender.

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[11] The fact that Texas does not routinely undertake such a review does not mean that it is unaware of the need for such undertaking. Indeed there are a handful of cases out of the 160 capital sentences which the Texas Court of Criminal Appeals has reviewed since 1975 in which the defendant has benefitted in part from such a review. See, Roney v. State, 632 S.W.2d 598, 603 (Tex. Cr. App. 1982) ("Although this was a senseless murder, that fact is true of every murder in the course of a robbery. ...to hold that the facts of this offense, standing alone would support such a verdict, would mean that virtually every murder in the course of a robbery would warrant the death penalty. Such a construction would destroy the purpose of the punishment stage in capital murder cases, which is to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition. Jurek v. State, 522 S.W.2d 934; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 Lawyers Edition 2d. 929."); García v. State, 626 S.W.2d 46, 51 (Tex. Cr. App. 1982); and Brasfield v. State, 600 S.W.2d 288, 293-4 (Tex. Cr. App. 1980).

Thus, Georgia's statutory death penalty response to Furman was held facially constitutional because it focused "the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. Gregg v. Georgia, supra, 428 U.S. at 207. (emphasis supplied) Florida's scheme also met with approval because the "sentencing authority's discretion" was found to be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty." Proffit v. Florida, supra, 428 U.S. at 258. By contrast, the mandatory statutes of North Carolina and Louisiana were condemned as "failing to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition on him of a sentence of death." Woodson v. North Carolina, supra, 428 U.S. at 302-305; see also, Roberts v. Louisiana, supra, 428 U.S. at 335-336. Although, as demonstrated earlier under No. IV. hereof, the Jurek plurality expected special issue number two to be interpreted to provide the jury guidance concerning both offense and offender, such expectation has not been fulfilled.

While recognizing that the Texas scheme differed from those upheld in Gregg and Proffitt, this Court based its determination that such difference as to aggravating and mitigating factors did not render the Texas procedure constitutionally infirm on its face since, together with the expectations previously mentioned, Texas had narrowed the categories of murders for which a death sentence could be considered. Jurek v. Texas, supra, 428 U.S. at 273. That particular line of reasoning, apparently, was based on a sole dissenting opinion in Furman which expressed the view that one method state legislatures might employ in redrafting death penalty statutes in light of Furman would be "by more narrowly defining the crimes for which the penalty is to be imposed." Furman v. Georgia, supra, 408 U.S. at 400 (Burger, C. J. dissenting). Subsequent decisions, other than Jurek, have

attached little, if any, significance to that view. See generally, Dix, Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question, 43, No. 7, Texas Bar Journal 627 (1980): Scofield, Due Process in the United States Supreme Court and the Death of the Texas Capital Murder Statute, 8 Am. J. Crim. Law 1 (1980). Moreover, the demonstrated constitutional shortcomings of special issue number two are powerfully magnified when the mandatory capital juror oath administered to Texas jurors[12] is considered. By that oath, a capital juror must swear "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Section 12.31(b), supra. (Appendix C) Not surprisingly then, the consideration of a Texas capital juror at the punishment phase is focused only on whether the defendant will probably continue to commit criminal acts of violence, without regard to mitigating evidence as here and in Eddings, and in violation of the "rule of Lockett."[13]

In sum, a Texas capital jury at the punishment phase is no more guided[14] than the sentencer in the imaginary kingdom of Erewhon, who upon sentencing a young man convicted of pulmonary consumption, opined:

> If you tell me that you had no hand in your parentage and education, and that it is therefore unjust to lay these things to your charge, I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected.

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[12] See Graham v. State, supra, 643 S.W.2d at 923-924 and White v. State, 610 S.W.2d 504 (Tex. Cr. App. 1981).

[13] Lockett v. Ohio, 438 U.S. 586 (1978).

[14] Indeed, this Court has previously indicated that proof of future dangerousness as contemplated by special issue number two may well be beyond the scope of what can reasonably be expected of a jury, stating "Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." Addington v. Texas, 441 U.S. 418, 429 (1979). Given that, the required constitutional conclusion that special issue number two fails to provide adequate guidance as to mitigating circumstances must follow as night follows day.

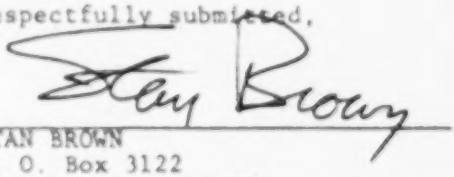
> You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate.
>
> Butler, Erewhon, p. 109-110, Modern Library, Inc. (1927).

The misguided results of special issue number two thus demand the Court's granting of certiorari in this case.

CONCLUSION:

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,



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Attorney for Petitioner,
Clifton Charles Russell, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES

83-5799

CLIFTON CHARLES RUSSELL, JR.,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

NO. 83-5799

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, CLIFTON CHARLES RUSSELL, JR. being first duly sworn, depose and say that I am the Petitioner, in the above-entitled PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present herein are the following: the unconstitutionality of my death sentence.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the action are true.

1. Are you presently employed?

No. I have been confined since December 3, 1979, and such confinement has been under penalty of death since April 18, 1980. I never maintained regular employment prior to December 3, 1979.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependant upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for perjury.

Clifton Charles Russell, Jr.
Clifton Charles Russell, Jr.

STATE OF TEXAS)
)
COUNTY OF WALKER)

BEFORE ME, the undersigned authority in and for said County and State, on this day personally appeared CLIFTON CHARLES RUSSELL, JR., petitioner herein, who states under oath that the facts and allegations contained in the foregoing AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS are true and correct.

SUBSCRIBED AND SWORN TO BEFORE ME this 22 day of Nov, 1983, to certify which witness my hand and seal of office.

Notary Public, State of Texas

Jeffrey W. Langley
(Printed or Stamped Name of Notary

My commission Expires: 10-25-86

APPENDICES

CLIFTON CHARLES RUSSELL, JR., Appellant

NO. 66,410 Vs. Appeal from TAYLOR County

THE STATE OF TEXAS, Appellee

O P I N I O N

This appeal is taken from a conviction for capital murder. Punishment was assessed at death by the court in accordance with the jury's affirmative answers to the two special issues submitted pursuant to Article 37.071(b)(1) and (2), V.A.C.C.P.

Appellant advances sixteen grounds of error. This is a circumstantial evidence case. Appellant challenges the sufficiency of the evidence at the guilt stage of the trial, to support the verdict, or to show that the murder was committed in the course of committing robbery. He also challenges the sufficiency of the evidence to support the jury's affirmative findings to special issues one and two at the penalty stage of the trial. In other grounds of error appellant contends the court erred in failing to quash the indictment as it did not name the victim of the robbery, that the court erred in admitting a blood sample taken from him by virtue of a search warrant, that the court erred in admitting an extraneous offense and prejudicial opinion testimony, that the court erred in refusing a special requested charge on "deliberate" at the penalty stage of the trial, and also erred in submitting special issues no. 2 as it is unconstitutionally vague.

We shall initially examine the evidence. The deceased, Hubert Otha Tobey, was an employee of the Federal Aviation Administration at the Abilene Municipal Airport. His working hours on Sunday, December 2, 1979 were from 4 p.m. until midnight. Rodney Tobey, deceased's son, testified his father

left home about 3:40 p.m. on that date to go to work. He was wearing a brown suede jacket, dark pants and Dan Post boots. The deceased was driving his wife's 1974 Lincoln Continental Mark IV automobile bearing Texas license plates MXM 997. The car had a defective tail light. He was to fill the automobile with gas after work. His wife's white Levi jacket was in the automobile. Rodney Tobey testified his father owned a pocket knife with two sharp blades and carried a wallet and a money clip.

Joe Boyle, air traffic control specialist with the Federal Aviation Administration, relieved the deceased at the airport on December 2, 1979. He arrived at the airport about 20 minutes to midnight, was briefed by the deceased on operational conditions. According to Boyle the deceased left the F.A.A. facility at approximately 11:45 p.m.

The deceased had been issued three Save a $ club gasoline credit cards, nos. 13,181, 13,182 and 13,183, for use at unmanned self-service gas stations. Insertion of a card would activate the gas pump and then information concerning the transaction would be relayed via telephone wires to a computer which would record the details, including the date, time, place, amount of gasoline purchased and the number of the credit card.

Donald Manley, computer programmer for Western Marketing Company, testified from computer printouts concerning the transactions of December 2, 1979. The printouts reflected that at 11:56 p.m. someone using card no. 13,181 issued to H. O. Tobey inserted the card at a pump at the station on South Seventh and Treadway Streets in Abilene. The system was activated, but no gas was pumped. At 11:59 p.m. the same card was used at the same pump to complete a transaction, reflecting that 20 gallons of gas were pumped.

Abilene police officer, Bernard Kastner, testified that while on patrol at 12:50 a.m. on December 3, 1979 he stopped at the Minute Stop Grocery at East Highway 80 and Washington Boulevard. There he observed a silver or grey Lincoln Continental with Texas license no. MXM 997. Standing on the left side of the car was a white male with curly brown hair. Kastner identified appellant as being of the same height and build of the person he observed by the car. He saw a black male, muscular build and acne facial marks, come out of the store and get into the car. The Continental then proceeded west on Highway 80.

James Miller, Abilene police officer, and his partner, David Gage, stopped at the Minute Stop about 12:50 a.m. on December 3. Miller saw Kastner's vehicle and a silver Continental. One man was in the driver's seat of the Continental and a black male came out of the store in a hurry, get in the car, and it proceeded west on Highway 80. Officer Gage described the driver of the Continental as a white male. He saw a black male come out of the store at a fast pace and get into the passenger's side of the car.

Both Gage and Miller noticed one of the tail lights on the Continental was not working. Gage stated a photograph of the Tobey Continental looked like the one he saw at the Minute Stop.

Between 9 and 9:30 a.m. on December 3 John Woods went to 526 Thomas Street in Abilene to pick up his stepdaughter's husband for work. Upon arrival, he saw a padlock on the door, and then observed a lot of blood and and brain matter. Woods went to get a friend and to call the police.

Abilene police officer, Jay Barbian, responded to the call and went to 526 Thomas Street. Barbian found the partially nude body of the deceased at the location.

Investigation uncovered a large piece of concrete with fresh blood on it. A bloody white Levi jacket was found as well as a brown suede jacket.

Dr. Jarrett Williams, a pathologist, conducted the autopsy on the deceased's body. He related Tobey had received a severe blow to his head, crushing his skull, which could have been from the bloody piece of concrete found at the scene. A large portion of the brain was missing. There were numerous knife wounds, one being to the juglar vein, which could have caused death.

Appellant was identified as one of two men entering the Big Tex Pawn Shop in Midland on December 3, 1979 between 9:30 and 10:30 a.m. John Dungan, the operator, also stated appellant was accompanied by a black male. They attempted to pawn a television set. When Dungan requested identification, the black male went to a silver Lincoln or Mercury, and then appellant presented Dungan with a driver's license with the name Tobey or Tomey on it. The license photo did not resemble appellant and appellant gave Dungan a different birth date than that on the driver's license. Dungan refused to accept the television set. When the two men left, Dungan took the license number of the car which he believed to be MXM 997.

Midland police officer, Ronnie Wilson, testified he saw a Lincoln bearing license plate number MXM 997 at the B & B Trading Post in Midland about 10 a.m. on December 3, 1979. Two men, one white, approximately appellant's size, and a black male, were unloading a television set from the car and taking it into the trading post.

Michael Wicker was hitchhiking from Plains, Texas to Hobbs, New Mexico, on the afternoon of December 3, 1979. About 10 miles out of Hobbs he was picked up by a white male and a black male in a silver Lincoln. He identified appellant as

the driver and William Battee, Jr., as the black male passenger. Battee told Wicker they got the car from appellant's "old lady," and when Wicker noticed blood in the car Battee explained appellant had been punched in the nose when he had taken the car keys. After arriving in Hobbs, they went to a Mimi Mall to get something to eat. Appellant, who was apparently drunk, and Battee began "grabbing" women in the mall, causing a disturbance. Wicker paid for their food and left. Appellant and Battee followed. Officers were near the Continental and all three men were arrested.

Hobbs police officer, Richard Baum, testified at approximately 2 p.m. on December 3 he went to the Mimi Mall and saw an illegally parked Lincoln Continental bearing Texas license MXM 997. Upon hearing yelling and cursing, he saw a black male and two white males. The black male was cursing and Baum arrested Battee, who gave his name as Willie Green. The two white males, identified as appellant and Wicker, crossed the street to calm Battee, but denied knowing him. Battee told officer Baum he was hitchhiking and had been picked up by appellant and Wicker. Appellant replied Battee had picked "them" up. Appellant gave his name, but it was different than the name he gave another officer. All three men were arrested with appellant being taken into custody for being intoxicated.

Baum learned the Continental was registered to the deceased. After a phone conversation with Sgt. Casey Bradshaw of the Abilene Police Department, Baum removed Battee's blood splattered tennis shoes. He removed appellant's pants, underwear, shirt and shoes. All items save the shoes had what appeared to be fresh blood on them. There were no marks or lacerations on appellant's body.

Sgt. James Murphy of the Hobbs Police Department locked and sealed the doors of the Lincoln Continental at a Hobbs garage on December 3, 1979. Inside the car he saw blood spots.

On December 3, Sgt. Casey Bradshaw of the Abilene Police Department talked with Officer Baum over the phone and later Bradshaw secured arrest warrants for appellant and Battee. In Hobbs the next day he inspected the Continental and found the deceased's F.A.A. identification card, the deceased's bank club card and a Save a $ credit card number 013181. He removed certain blood stained parts of the right front door and took blood scrapings from other parts of the car. He received items of clothing from the Hobbs police that had been taken from appellant and Battee.

The deceased's Dan Post boots were found in a Midland cemetery.

Sarah Williams, forensic serologist, compared blood samples of the deceased with known blood samples from the appellant and Battee, as well as with blood samples removed from the Continental and from the clothing of appellant and Battee. As a result of various tests and comparisons, Williams was able to determine the blood on appellant's clothing was not his nor that of Battee. The blood was compatible with that of the deceased. While appellant, Battee and the deceased all had blood type O, there were differences in the enzyme structure. Williams related that only .005% of the population had blood exactly like that of the deceased.

A footprint found at the Abilene gas station where the credit card was used matched a footprint found at 526 Thomas Street where the body was discovered, and matched the tennis shoes worn by Battee when arrested.

The State also called Jose Gonzales, who testified he came to Abilene on November 24, 1979, prior to the instant case. Near midnight he met appellant and Battee in a club. About an hour later the three left in Gonzales' packup truck, supposedly to look for women. Once out in the country, appellant and Battee began beating Gonzales. They took his clothes, his watch and wallet containing $140.00. They drove off in the pickup after telling Gonzales to run.

The appellant offered no evidence at the guilt stage of the trial.

Every circumstantial evidence case must necessarily be tested by its own facts to determine the sufficiency of the evidence to support the conviction, LeDuc v. State, 593 S.W.2d 678 (Tex.Cr.App. 1979); Earnhart v. State, 575 S.W.2d 551, 554 (Tex.Cr.App. 1979); Flores v. State, 551 S.W.2d 364 (Tex.Cr.App. 1977); Carlisle v. State, 549 S.W.2d 698 (Tex. Cr.App. 1977); Indo v. State, 502 S.w.2d 166 (Tex.Cr.App. 1973), and viewed in the light most favorable to the State. Ysasaga v. State, 444 S.W.2d 305, 308 (Tex.Cr.App. 1969).

And it is well established that a conviction on circumstantial evidence cannot be sustained if the circumstances proven do not exclude every other reasonable hypothesis except that of the guilt of the accused; and proof amounting only to a strong suspicion or mere probability is insufficient. Flores v. State, supra; Earnhart v. State, supra; Stogsdill v. State, 552 S.W.2d 481 (Tex.Cr.App. 1977); Culmore v. State, 447 S.W.2d 915 (Tex.Cr.App. 1969).

In Moore v. State, 532 S.W.2d 333 (Tex.Cr.App. 1976), it was written:

> "Ordinarily, the test on appeal is whether there was evidence from which the jurors (advised of the restrictions the law places upon them in

> condemning one on circumstantial evidence)[1/] might reasonably conclude that every reasonable hypothesis other than guilt was excluded. Ysasaga v. State, supra (444 S.W.2d 305)."

It has also been stated in 24 Tex.Jur.2d, Evidence, § 742, p. 424:

> "In ascertaining whether the guilt of the accused has been established to a moral certainty, the appellate court will review the evidence in light of the presumption that the accused is innocent. The court will not presume any acts against the accused that are not shown to have been committed by him. Furthermore, a conviction will not be sustained on appeal if the evidence does not sufficiently establish all material elements of the offense charged." Ysasaga v. State, supra; Flores v. State, supra; Nathan v. State, 611 S.W.2d 69 (Tex.Cr.App. 1981).

In circumstantial evidence cases it is not necessary, however, that every fact point directly and independently to the defendant's guilt. It is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances. Flores v. State, supra; Mills v. State, 508 S.W.2d 823 (Tex.Cr.App. 1974); Herndon v. State, 543 S.W.2d 109 (Tex.Cr.App. 1976). The rules of circumstantial evidence do not require that the circumstances should to a moral certainty actually exclude every hypothesis that the act may have been committed by another person, but the hypothesis intended is a reasonable one consistent with the circumstances and facts proved, and the supposition that the act may have been committed by another person must not be out of harmony with the evidence. Jones v. State, 442 S.W.2d 698 (Tex.Cr.App. 1969); Taylor v. State, 221 S.W. 611, 615 (Tex.Cr.App. 1920); Flores v. State, supra; Nathan v. State, supra at p. 75.

1/ This was at least true until the time of the majority opinion in Hankins v. State, 646 S.W.2d 191 (Tex.Cr.App. 1983).

The record shows that the deceased left home for work on December 2, 1979 in his wife's Continental automobile wearing Dan Post boots, with wallet and money clip. He was last seen alive leaving work about 11:45 p.m. His body was found the next morning about 9:30 a.m. at 526 Thomas Street, brutally beaten, one-third of his brain missing. His trousers were found on top of a shed with the pockets turned inside out. The Continental, boots, money, etc., were missing.

About an hour after the deceased left work a man meeting appellant's description was seen in the deceased's car, along with a black male companion at the Minute Stop in Abilene. About the time the body was discovered appellant was identified as being in Midland trying to pawn a television set using the deceased's identification. He was with a black male and was seen in the deceased's car. The deceased's boots were found in Midland. Other evidence placed the appellant in New Mexico driving the deceased's car. He was with William Battee, a black male. When arrested, he first gave a different name. There was blood in the car and on his clothes. The blood on his clothes was shown not to be his or Battee's and was shown to be compatible with that of the deceased.

The evidence was sufficient to show a murder committed in the course of a robbery (V.T.C.A., Penal Code, § 29.02) as alleged. Appellant's sufficiency of evidence (at the guilt stage) contentions are overruled.

Appellant also contends the trial court "erred in failing to quash the indictment as to count one therein for the reason that same fails to provide adequate notice in that said count fails to name the victim of the robbery appellant was allegedly in the course of committing."

The conviction in the case was upon count one of the indictment drafted pursuant to V.T.C.A., Penal Code, § 19.03(a)(2), which in pertinent part alleged the appellant:

> ". . . did then and there unlawfully, intentionally and knowingly cause the death of an individual, Hubert Otha Tobey, by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife; and the said Clifton Charles Russell a/k/a Clifton Charles Lacy did then and there intentionally cause the death of the said Hubert Otha Tobey in the course of committing the offense of robbery."

An examination of appellant's motion to quash reflects it was directed to a claim of duplicitous pleading in that two means of causing death were alleged and that it failed to put the appellant on proper notice as to the manner of death. There was no claim therein of failure to name the victim of the robbery.

Appellant raises this ground for the first time on appeal since it was not contained in his motion to quash. Appellant relied upon Brasfield v. State, 600 S.W.2d 288 (Tex.Cr.App. 1980), and King v. State, 594 S.W.2d 425 (Tex.Cr.App. 1980). See also Silguero v. State, 608 S.W.2d 619 (Tex.Cr.App. 1980); Evans v. State, 601 S.W.2d 943 (Tex.Cr.App. 1980).

The instant case can be distinguished from the above cases. In the instant case, unlike the cases above, no motion to quash was made upon the basis that the indictment failed to allege the victim of the underlying offense. Absent an attempt to draw the trial court's attention specifically to the failure to name the victim of the underlying transaction, nothing is presented for review. Kipperman v. State, 626 S.W.2d 507, 512 (Tex.Cr.App. 1981); Woolls v. State, ___ S.W.2d ___ (Tex.Cr.App. # 68,878, 3/9/83).

A jurisdictional defect in an indictment is a defect which renders the indictment insufficient in that it fails to

allege the constituent elements of the offense. Terry v. State, 517 S.W.2d 554 (Tex.Cr.App. 1975); Brem v. State, 571 S.W.2d 314 (Tex.Cr.App. 1978). The instant indictment does not suffer such defect. There is no fundamental error.

In two grounds of error appellant complains of the admission of testimony concerning a blood sample taken from him because it was obtained by virtue of an invalid search warrant, and argues if the warrant was facially valid then the procedure authorized by Article 18.02(10), V.A.C.C.P., as applied to him was an unreasonable legislative classification denying him equal protection of the law.

It is his initial argument that Article 18.02(10), supra, does not list blood as one of the grounds for the issuance of a search warrant, and that a search warrant issued for that reason was invalid. The appellant filed a motion to quash the warrant. In said motion he asked in the alternative for a motion to suppress the results in the event it was too late to prevent the taking of his blood. The motion was overruled. Whether there was a hearing does not appear from the record. The search warrant, if any, is not in the record. There is no transcription of the court reporter's notes, if any, to be transcribed. We are unable to appraise the action of the trial court or to determine if appellant ever urged his motion to suppress.

Sgt. Bradshaw testified on January 29, 1980, he executed a search warrant on appellant and blood was taken. There was no objection to this testimony nor to the latter testimony of the forensic serologist as to her tests concerning such blood sample.

If it can be argued that appellant has preserved his contention for review, it is observed that this court has recently held that blood is an item for which a search warrant

may issue under Article 18.02(10), V.A.C.C.P., as amended 1977. See Gentry v. State, 640 S.W.2d 899 (Tex.Cr.App. 1982) (Opinion on Discretionary Review Without Petition).

Appellant's other argument as to the denial of the equal protection of the law is based on the fact that Article 18.01(e), V.A.C.C.P., prohibits the issuance of a search warrant under Article 18.02(10), supra, if the property or items are located in an office of a newspaper, news magazine, television station or radio station.

There was no objection on this basis in the trial court. Failure to object can even waive an error involving constitutional rights. Mendoza v. State, 552 S.W.2d 444 (Tex.Cr.App. 1977); Hovila v. State, 562 S.W.2d 243 (Tex.Cr.App. 1978). See also Watkins v. State, 572 S.W.2d 339 (Tex.Cr.App. 1978); Shannon v. State, 567 S.W.2d 510 (Tex.Cr.App. 1978). Even if appellant had properly objected, his contention would still be without merit. In order to successfully claim denial of equal protection of the law on the basis of unreasonable classification, an accused must prove the existence of a class of which he is a part and unreasonable discrimination. See Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). This appellant has failed to do.

Next, appellant urges the court erred, over objection, in admitting evidence obtained by an illegal warrantless search of his person. Hobbs Officer Baum testified that about 30 minutes after appellant was arrested, and after talking with Sgt. Bradshaw in Abilene, he took appellant's trousers from him in the jail cell without a warrant therefor. There was no objection to this testimony. During the testimony of the forensic serologist when the trousers were offered, the only objection was that it was "a warrantless search." The objection was overruled. It is questionable whether the contention is preserved for review in light of the general objection.

Further, we conclude the clothing was admissible under United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). Still further, it is observed that Baum and later Bradshaw testified as to the clothing and its condition without objection prior to the forensic serologist's testimony. It would appear the failure to timely object waived any right to complain on appeal. Crocker v. State, 573 S.W.2d 190 (Tex.Cr.App. 1978); Chambers v. State, 568 S.W.2d 313 (Tex. Cr.App. 1978); Von Byrd v. State, 569 S.W.2d 883 (Tex.Cr.App. 1978). See also Boulware v. State, 542 S.W.2d 677 (Tex.Cr. App. 1976); Shumake v. State, 502 S.W.2d 758 (Tex.Cr.App. 1973).

Appellant additionally contends the trial court committed error in admitting evidence of the prior extraneous robbery of Jose Gonzales on November 25, 1979.

This was a circumstantial evidence case. There was no direct evidence placing appellant at the scene of the murder. Extraneous offenses are admissible on the question of identity if the extraneous offense has sufficient common distinguishing characteristics to show that it was the handiwork of the accused, and the State's case is entirely circumstantial on the question of identity. Hinkle v. State, 442 S.W.2d 728 (Tex.Cr.App. 1969); Jones v. State, 568 S.W.2d 847 (Tex.Cr.App. 1978).

Gonzales was robbed by appellant and Battee, a white male and a black male. It appears that the deceased Tobey was robbed by two men, one white, one black. Both robberies occurred near midnight, both involved a male victim who was alone, both victims were undressed or partially undressed. In each case a motor vehicle was taken. The robberies took place nine days apart in Abilene. There were sufficient common distinguishing characteristics or similarities to justify the admission of the extraneous offenses. See

Ransom v. State, 503 S.W.2d 810 (Tex.Cr.App. 1974). Hinkle v. State, supra.

Appellant's contention is overruled.

In five grounds of error appellant complains the court erred in admitting prejudicial opinion testimony "amounting to a conclusion of law." Reference is made to the testimony of Abilene police officers Melvin Martin, John Perry and Casey Bradshaw and Otis Wiley, investigator with the district attorney, as well as Robert Lee Boone, a convicted felon. All of these witnesses were permitted to testify as to the probability of appellant being violent in the future. The objection to their testimony was that they were not qualified to state their conclusion or opinion. The officers had all known appellant for several years, some having handled him as a juvenile. Boone was a Taylor County jail inmate when appellant had been incarcerated there. Appellant had beaten him because he had mumbled in his sleep. Based on this experience and his prior experience in the penitentiary, he expressed opinion appellant would be violent in the future.

The trial objection to each witness' testimony went to the weight to be given and not the admissibility of the testimony. On appeal appellant argues the witnesses were permitted to state a conclusion of law. The ground of error does not comport with the trial objection, and nothing is presented for review. Carrillo v. State, 591 S.W.2d 876 (Tex. Cr.App. 1979); Cain v. State, 549 S.W.2d 707 (Tex.Cr.App. 1977).

Further, we have previously held that a properly qualified lay witness could state an opinion concerning the probability that a capital murder defendant would continue to commit criminal acts of violence. Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980); Simmons v. State, 594 S.W.2d 760 (Tex.Cr. App. 1980). Each of the witnesses here involved knew the appellant and were in a position to express the opinions they did.

Further, Article 37.071(a), V.A.C.C.P., provides in part:

> ". . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence . . . ."

Appellant's contentions are overruled.

Appellant complains the court failed to respond to his objection to the inclusion of Special Issue No. 2 in the charge on punishment since the provision relating to said special issue is unconstitutionally vague. The contention is overruled. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Collins v. State, 548 S.W.2d 368 (Tex. Cr.App. 1976); Barefoot v. State, 596 S.W.2d 875 (Tex.Cr. App. 1980). See also Granviel v. State, 552 S.W.2d 107 (Tex. Cr.App. 1976).

No error is shown.

Still further, appellant contends the court "erred in failing to respond to appellant's timely requested charge, and instruction to the jury at the punishment phase defining 'deliberate.'" Reference is made to Special Issue No. 1.

Article 37.071(b), V.A.C.C.P., provides in part:

> "(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; . . . ." (Emphasis supplied.)

The court submitted the following charge:

> "Special Issue No. 1
>
> "Was the conduct of the defendant, Clifton Charles Russell, Jr., that caused the death of the deceased, Hubert Otha Tobey, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?"

Appellant's special requested charge was as follows:

> "Now comes Clifton Charles Russell, Defendant in the above-styled and numbered cause, by and through his attorneys of record, and requests that the following be included in the Court's charge to the jury herein:
>
> "I.
>
> "The word 'deliberate' means formed or arrived at or determined upon a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand.
>
> "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of Defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is then deliberate.
>
> "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A 'cold, calculated judgment and a decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as deliberate murder. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decided to and does kill.
>
> "WHEREFORE, Defendant prays that the above requested charge be made a part of the Court's charge to the jury herein."

This was the special requested charge which was denied by the trial court.

The words "deliberate" or "deliberately" are not statutorily defined in the Code of Criminal Procedure or Penal Code.

It is not error, in a prosecution for violating a statute, to refuse to define a word used in the statute, when such word is used in its ordinary sense, and it is easily comprehended by everyone. Humphreys v. State, 30 S.W. 1066 (Tex.Cr.App. 1895).

Where there is no statutory definition of a term, the question of trial court's obligation to define the term depends on whether the term has such a common and ordinary meaning that jurors can be fairly presumed to know and apply such meaning. Phillips v. State, 597 S.W.2d 929 (Tex.Cr.App. 1980).

Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury. Hogan v. State, 496 S.W.2d 594 (Tex.Cr. App. 1973), cert.den. 414 U.S. 862; Joubert v. State, 124 S.W.2d 368 (Tex.Cr.App. 1938).

In King v. State, 553 S.W.2d 105, 107 (Tex.Cr.App. 1977), this court held the trial court need not define "deliberately" as used in Article 37.071, supra, in its charge at the penalty stage of a capital murder trial. See also Sanne v. State, 609 S.W.2d 762 (Tex.Cr.App. 1980); Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981).

Further, the appellant has made no showing that he was entitled to the special requested charge set out above, and upon which he relies.

In Granviel v. State, 552 S.W.2d 107, 123 (Tex.Cr.App. 1976), this court wrote:

> "The statutory requirements that appellant's conduct be committed deliberately does not mean that it must be a premeditated act."

In Fearance v. State, 620 S.W.2d 577, 584 (Tex.Cr.App. 1980), this court wrote:

> "On the other hand, resort to other determinations of evidentiary sufficiency for special issue one is instructive for we know that 'deliberately,' as used in that question of the charge on punishment, is not the linguistic equivalent of 'intentionally,' as used in the charge on guilt-innocence, Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981); rather, it is the thought process which embraces more than a will to engage in conduct and activates the intentional conduct."

Footnote # 6 of Fearance reiterates that "deliberately" need not be "premeditated."

Under these authorities the requested charge would not have been proper.

We do not understand that appellant contends that this court should now devise a definition of "deliberately," set it forth, and reverse the conviction for the failure of the trial judge to have the foresight not to give the same definition in his instructions to the jury.

Appellant's ground of error is overruled.

Appellant also challenges the sufficiency of the evidence to support the jury's affirmative answer to special issue number one. That issue as submitted under Article 37.071(b)(1), V.A.C.C.P., has already been set out. Taking into consideration the evidence at both stages of the trial, we conclude, without reiterating the testimony, that it was sufficient to support the jury's "yes" answer to special issue number one. See Granviel v. State, 552 S.W.2d 107, 122-123 (Tex.Cr.App. 1976).

Appellant makes claim that the evidence is insufficient to support the affirmative finding at the penalty stage of the trial as to Special Issue No. 2 as to the probability of future criminal acts of violence.

It is well established that the circumstances of the offense itself can sustain an affirmative answer to the second special issue under Article 37.071, supra, if they are severe enough. Mitchell v. State, ___ S.W.2d ___ (Tex.Cr.App. # 68,915, 6/15/83); King v. State, 631 S.W.2d

486 (Tex.Cr.App. 1982); Brooks v. State, 599 S.W.2d 312 (Tex.Cr.App. 1979); Muniz v. State, 573 S.W.2d 792, 795 (Tex.Cr.App. 1978). The jury, at the penalty stage of the trial, may consider all of the evidence adduced at the guilt stage of the trial. Russell v. State, 598 S.W.2d 238, 254 (Tex.Cr.App. 1980); O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr. App. 1979); Duffy v. State, 567 S.W.2d 197 (Tex.Cr.App. 1978); Felder v. State, 564 S.W.2d 776 (Tex.Cr.App. 1978); Brock v. State, 556 S.W.2d 309 (Tex.Cr.App. 1977); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976). Indeed, the circumstances of the offense and the facts surrounding it may furnish greater probative evidence than any other evidence regarding the second special issue submitted at the penalty stage of a captial murder case. Duffy v. State, supra, and cases there cited; Crawford v. State, 617 S.W.2d 925, 933 (Tex.Cr.App. 1980).

The facts in the instant case reveal a brutal murder committed during the course of a robbery. In addition to numerous knife wounds to the body, including one to the jugular vein, the deceased's skull was crushed by a piece of concrete. The deceased's money and automobile were taken. Jose Gonzales, nine days earlier, had also been attacked and beaten, and his truck taken. There was also testimony that after being confined in the Taylor County jail appellant beat another inmate. There was testimony from several witnesses that appellant's general reputation for being a peaceful and law-abiding citizen was bad, and that in their opinion he would continue to commit acts of violence in the future.

There was no psychiatric testimony, but it is not essential to support an affirmative finding to the special issue in a capital murder case. Brooks v. State, supra; Freeman v. State, 556 S.W.2d 287 (Tex.Cr.App. 1977); Burns v. State, 556 S.W.2d 270 (Tex.Cr.App. 1977).

When the facts of the instant offense are considered with the additional evidence of the extraneous robbery, the beating in jail and appellant's reputation, we conclude the evidence is clearly sufficient to support the jury's finding of "yes" to the second special issue. See Mitchell v. State, supra; Earvin v. State, 582 S.W.2d 794 (Tex.Cr.App. 1979); cert.den. 444 U.S. 985; Brooks v. State, supra.

Appellant's contention is overruled.

The judgment is affirmed.

ONION, Presiding Judge

(Delivered July 6, 1983)

En banc

CLIFTON CHARLES RUSSELL, JR., Appellant

NO. 66,410 v. - - - Appeal from TAYLOR County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

This automatic appeal[1] results from a conviction for the offense of capital murder pursuant to V.T.C.A. Penal Code, §19.03(a)(2).[2] Upon the jury's return of affirmative findings to two special issues submitted at the punishment phase, Article 37.071(b), V.A.C.C.P., appellant's punishment was assessed at death. Article 37.071(e), supra.

Complaint is made of the failure of the trial court to instruct the jury at the punishment phase as to the definition of "deliberately" as that term is employed in the first special issue.[3]

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[1] See Article 37.071(f), V.A.C.C.P.

[2] Section 19.03, supra, provides in germane part:

"(a) A person commits an offense if he [intentionally or knowingly causes the death of an individual] under Section 19.02(a)(1) of this code and:

. . .

(2) the person commits the murder in the course of committing or attempting to commit. . . robbery. . .;

. . .

[3] Article 37.071, V.A.C.C.P. provides in pertinent part:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment.

. . .

(b) Upon conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

Footnote 3 continued -

Appellant presented a written instruction in this regard and requested its submission to the jury, but the charge was refused by the trial court. Article 36.15, V.A.C.C.P.

Appellant now contends that a definition of "deliberate" was essential to assist the jury in making a rational inquiry as to the first special issue. More specifically, he argues "that the deliberateness inquiry of special issue number 1 must logically focus on something other than. . . whether the killing was intentional, which question was answered by the jury prior to the punishment phase," and assails, among others, this Court's opinion in King v. State, 553 S.W.2d 105 (Tex.Cr.App. 1976), as having "failed to properly distinguish between the requirement of an intentional killing at the guilt-innocence phase and the deliberateness inquiry of special issue number 1."

This attack on King is misplaced. The holding of King - that the trial court need not provide special definitions for several terms contained in Article 37.071(b)[4/] - was bottomed upon the recognition that: the words had not been specially defined by the Legislature; jurors are supposed to know the common meaning of terms, simple in themselves; and the Supreme Court of

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Footnote 3 continued -

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; * * *"

(All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

[4/] These terms are: "deliberately;" "probability;" "criminal acts of violence;" "continuing threat to society."

the United States, in determining our special issues adequately guide the capital jury's deliberations on the matter of punishment, did not require special definitions of the terms in question. The reasoning of King is sound and I would adhere to it today.

Appellant's contention and supporting arguments, however, do raise a fair question as to whether developments within the last six years - matters not necessarily available to the Court or contemplated at the writing of King - have modified some or all of the underpinnings (as opposed to reasoning) of that decision as regards the term "deliberately." Illustrative is appellant's suggestion that "deliberately," though a simple word of and by itself, has now taken on a "technical" meaning;[5/] that the "common" word has become "uncommon" in the context of our capital murder procedure.

Therefore, it is appropriate to first consider whether the word "deliberately" has taken on in any material fashion a "special definition."[6/]

5/ Indeed, this Court has held that "deliberately" is something distinct from "intentionally." Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981).

6/ Article 3.01, V.A.C.C.P. provides that,

> "All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined."

In a related context, the Code of Construction Act, Article 5429b-2, V.A.C.S., several sections of which apply to our penal code, V.T.C.A. Penal Code, §1.05(b), provides in part:

> "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Section 3.01, et.

Obviously, in view of the fact that "deliberately" was not defined by the Legislature, the focus of the Court's analysis began on what it is not. In Smith v. State, 540 S.W.2d 693 (Tex. Cr.App. 1976) the Court, in reviewing the sufficiency of the evidence to support the special issue findings in general, made clear by implication that the fact a defendant is not the "triggerman" in the murder is not of and by itself dispositive of the first special issue. Though guilty of the offense of capital murder only through application of the law of parties,[7/] Smith's individual conduct which "aided" and "encouraged" another in the commission of the murder was correctly held to support the jury's finding on the first special issue: Smith was the first to attempt to shoot the victim, and when his weapon misfired, he called to his confederate, "Get him." In Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1976), rejecting a contention that the affirmative answer to special

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7/ Now V.T.C.A. Penal Code, §§7.01 and 7.02. At the time Smith committed the offense, the law of "principals" was contained in Vernon's Ann.P.C. Articles 65, 66, 68 and 69.

issue number 1 was insufficiently supported by evidence because it did not show that the killing was "premeditated," this Court held, "The statutory requirement that a killer's conduct be committed deliberately does not mean that it must be a premeditated act." [Emphasis original]

Meanwhile, the battle raged over whether "intentionally" and "deliberately" were the same or different, and if different, in what way. A great deal of confusion between the two words, their meanings and import in the Texas capital murder scheme was clearly extant among lawyers and judges, as well as legal scholars, [3/] since before the Supreme Court approved the facial constitutionality of that scheme and its application by the Texas courts in Jurek v. State, 522 S.W.2d 934 (Tex.Cr.App. 1975). Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Moreover, virtually every member of this Court has at one time or another confronted a record of capital voir dire examination in which either the trial judge or prosecutor informs a veniremember that "deliberately" means the same thing as "intentionally." And though it was held

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[8/] E.g., Practice Commentary following V.T.C.A. Penal Code, §19.03; oral argument on the constitutionality of Texas death penalty procedure in Jurek v. Texas, infra, 19 CrL 4007 (1976); Blansett v. State, 556 S.W.2d 322, 327 n. 6 (Tex.Cr.App. 1977); Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath.U.L.Rev. 1, 3 (1977); Crump, Capital Murder: The Issues in Texas, 14 Hous.L.Rev. 551, 555 (1977); Goldstein, "Objections to the Court's Charge on Punishment;" "Objection No. 16" at G-191 (printed in Capital Murder Defense Course Materials prepared for the Criminal Defense Lawyer's Project, December 1978); and Wilder v. State, 583 S.W.2d 349 (Tex.Cr.App. 1979).

by implication that the words are not equivalents early on,[9/] the controversy ultimately necessitated this Court's recent decision in Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981).

In Heckert, supra, after the jury found the defendant guilty of intentionally causing the death of his victim while in the course of burglary, that same jury returned a negative finding on the first punishment issue. Contending on appeal that "deliberately" and "intentionally" are "linguistic equivalents," Heckert argued that the jury's verdicts on guilt and punishment could not be reconciled and presented a fatal variance requiring reversal. In rejecting Heckert's contention, we held:

> "If this Court were to adopt appellant's argument that deliberately and intentionally or knowingly were linguistic equivalents, it would render Art. 37.071(b)(1), supra, a nullity. Under such a holding [the deliberateness question] would be a useless thing in that a finding of an intentional or knowing murder would be irreconcilable with a finding that the defendant's conduct was not committed deliberately. We will presume that the Legislature would not have enacted Art. 37.071(b)(1), supra, had it intended for a finding of deliberateness to be based upon the same standard as that of intentional or knowing."

612 S.W.2d at 550, 551. But see Blansett v. State, 556 S.W.2d 322, 327, n. 6 (Tex.Cr.App. 1977).

If, as King, supra, instructs, we are to take the common meaning of a simple word in its ordinary usage, any handy dictionary will confirm that "deliberately" means just that - a manner of doing an act that is "characterized by or resulting from careful and thorough consideration," "characterized by awareness of the consequences; willful," "slow, unhurried, and steady as though allowing time for a decision." Webster's New Collegiate

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9/ E.g., Ex parte Sierra, 514 S.W.2d 760 (Tex.Cr.App. 1974); Brown v. State, 554 S.W.2d 677 (Tex.Cr.App. 1977).

Dictionary, G. & C. Merriam Co. (1977).[10] That definition has not varied from the one approved by this Court more than eighty years ago in Ferguson v. State, 35 S.W. 369, 370 (Tex.Cr.App. 1896):

> "'Deliberately' means 'with careful consideration or deliberation; with full intent; not hastily or carelessly, -- as a deliberately formed purpose.'"

This definition was in turn reiterated with approval sixty five years ago in Welch v. State, 157 S.W. 946 (Tex.Cr.App. 1913).

Most recently, in Fearance v. State, 620 S.W.2d 577, 584 and 584 n. 6 (Tex.Cr.App. 1981) (Opinion on appellant's motion for rehearing), we characterized "deliberately" as "the thought process which embraces more than a will to engage in conduct and activates the intentional conduct," and described "the person who engages in certain conduct deliberately" as one who "has upon consideration said to himself, 'Let's do it.'"

I would adhere to the Granviel holding and continue to say that conduct committed "deliberately" need not be "premeditated," for deliberation is but an element of premeditation. As explained in Black's Law Dictionary (4th rev.ed. 1968) at 1343:

> "Premeditation differs essentially from will, which constitutes the crime; because it supposes, besides an actual will, a deliberation, and a continued persistence." [Emphasis original]

See also Fearance at 584, n. 6.

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[10] Webster's New Word Dictionary, McMillan Students Ed., the McMillan Company, New York (1969) defines the adjective "deliberate" as "carefully thought out or formed; done on purpose," or "careful in considering; not rash or hasty," or "slow; unhurried."

It also discloses the word "deliberate" made its first appearance in Old English, having been borrowed from the Latin word "deliberatus," the past participle of the irregular infinitive "deliberare," meaning "to weigh in mind, ponder," which in turn is derived from de + libra, meaning "scale."

This was the basic thrust of the charge requested by appellant in the instant case. See majority opinion at 16.

Similarly, I would adhere to the rejection by Granviel, supra, of the notion that a killing committed in a purported "frenzy" cannot be effected deliberately and with the reasonable expectation that death would result. See also Fearance, supra; Duffy v. State, 567 S.W.2d 197 (Tex.Cr.App. 1978).

In short, I believe that the first premise underlying the conclusion in King, is still viable today: "deliberately" is a word simple in itself and as used in Article 37.071(b)(1), is to be understood in its ordinary meaning. It has taken on a technical or special definition only in the sense enunciated in Heckert, supra: "deliberately" is neither the linguistic nor connotative equivalent of "intentionally." And as Heckert acknowledges, this distinction is crucial, for a failure to regard it would render the first special issue a nullity.

But King also teaches that words which are used in their ordinary sense are "not necessarily to be defined in the charge to the jury," because "jurors are supposed to know such common meaning and terms," citing Joubert v. State, 124 S.W.2d 368 (Tex. Cr.App. 1939). It is accordingly necessary to consider whether there exists at this point in the evolution of our capital murder law, any compelling reason to require that "deliberately" be defined in its ordinary sense, in the court's instructions to the jury at punishment, should such a definition be requested.

Before reaching the questions of whether Georgia, Florida, Texas, North Carolina and Louisiana had enacted constitutional procedures for imposition of the death penalty, the Supreme Court of the United States was obliged to first determine whether the "punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is

cruel and unusual in violation of the Constitution," an issue previously presented to the Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), but not at that time resolved. Gregg v. Georgia, 428 U.S. 153, 168-169, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In rejecting Gregg's contention in this regard, the Supreme Court considered, among other things, whether death is a punishment disproportionate to the crime:

> "There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes. [citations omitted]."[11/]

Gregg v. Georgia, supra, at 187. Having determined that death is a suitable punishment in deliberate killings, the Supreme Court observed that Furman mandates that where discretion is afforded a sentencing body, that discretion must be "directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, supra, at 189. In addition to a fair procedure, the Constitution requires "accurate sentencing information"[12/] [as] an indispensible prerequisite to a reasoned determination of whether a defendant shall live or die. . ." Gregg, supra, at 190.

[11/] Judgment of the Court announced by opinion of Justice Stewart, joined by Justices Powell and Stevens [hereinafter "the Supreme Court" consistent with all other decisions of this Court since July 2, 1976].

[12/] The exercise of informed sentencing discretion, according to the Court in Gregg, requires taking into account: (1) the circumstances of the offense; (2) the character; and, (3) the propensity of the offender. See also Lockett v. Ohio, 438 U.S. 321, 98 S.Ct. 2981, 57 L.Ed.2d 1000 (1978), [holding "individualized sentencing" is constitutionally required in capital cases].

After praising the procedure of bifurcating the issues of guilt and punishment, the Court concluded:

> "But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used. . . by a jury, [the members of which are] unlikely to be skilled in dealing with the information they are given."

Gregg, supra, at 192. Conceding that the problem of appropriate use of relevant information by juries "may not be totally correctible," the Court noted that "[i]t seems clear. . . that the problem will be alleviated if the jury is given guidance[13/] regarding the factors about the crime and the defendant. . . ." Id.

Having determined the requisites of constitutional imposition of the death penalty, the Supreme Court proceeded to measure several state statutes against those requisites. In both Gregg, supra, and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court rejected "vagueness and overbreadth" attacks on the Georgia and Florida statutory "aggravating circumstances," repeatedly referencing the manner in which the State

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13/ Particularly relevant to the issue before us today is the following rationale:

> "The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

Gregg, supra, at 193.

Supreme Courts had construed provisions up to that point,[14] and declining to presume they would adopt "open-ended constructions" in the future.

Viewing the Texas proscriptions of the offense, capital murder, themselves as serving the same purpose as the aggravating circumstances codified by Georgia and Florida law, the Supreme Court in Jurek, supra, saw the constitutionality of the Texas procedure dependent on whether the special issues embodied in Article 37.071(b), supra, "allow consideration of particularized mitigating factors."[15] Jurek, supra, at 272. The Court concluded:

> "It thus appears that, as in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. . . ."

Jurek, supra, at 273-274.

The Supreme Court made clear its understanding of the role

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[14] In Gregg, supra, the Court pointed to the Georgia Supreme Court's striking one of the statutory aggravating circumstances for failure to provide "clear and objective standards," and that Court's demonstration of "a concern that the new sentencing procedures provide guidance to juries."

Similarly, in Proffitt, supra, the Court observed that under Florida Supreme Court decisions, statutory provisions were not "impermissibly vague" and had been "construed in a manner providing adequate guidance."

[15] Observing that systems allowing only consideration of aggravating circumstances are unconstitutional for failure to provide individualized sentencing determinations, the Court stated,

> "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

Jurek, supra, at 271. Accord Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

of the second special issue,[16] as construed by this Court, to be a focus on the "particular circumstances" of the "individual offender," his character and propensities. The other prong of the constitutionally mandated sentencing inquiry - "objective consideration of the particularized circumstances of the individual offense" - seems particularly well met by our first and third special statutory issues.[17] Unlike the second special issue, the first and third focus the jury's attention upon historical facts surrounding commission of the offense. The first special issue, unlike the third, is submitted in all capital cases in which the accused is found guilty; it could be labeled a "mitigating factor" since a negative jury finding thereon automatically operates to "mitigate" the punishment to life. Conversely, the focus of the "deliberateness" inquiry might be better characterized an "aggravating circumstance" because an affirmative finding on it is a prerequisite to imposition of a sentence of death.

Apparent, then, is the crucial function of the "deliberateness question" in the Texas capital murder scheme: potentially

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[16] "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071(b)(2), V.A.C.C.P.

[17] See n. 3, ante, for recitation of the "deliberateness question," the first special issue. The third special issue inquires:

> "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

See Evans v. State, 601 S.W.2d 943, 946 (Tex.Cr.App. 1980) [wherein third punishment issue was construed "to permit the jury to consider particularized mitigating circumstances"].

the difference between life imprisonment and death. It follows that the jury's consideration of this question must be focused on the individual conduct of the defendant in the capital murder transaction and that the jury comprehend its meaning as distinct from other inquiries in the case. As the Supreme Court reiterated, Furman's "basic requirement" is to "replace[] arbitrary. . . jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Because of the qualitative difference between death and other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, supra, at 305.

It has come to this Court's attention from numerous and diverse sources that the term "deliberately" as employed in the first special punishment issue in our statutory capital murder scheme has created a great deal of confusion, calling into question the reliability of jury findings made thereon. See n. 8, ante, and accompanying text. It is now unreasonable to assume that jurors will be able to determine the issue reliably without further assistance when legal scholars and members of the bench and bar have debated the subject continuously for more than seven years.[18/] The meaning of the word "deliberately" is now settled; thus, assistance to the jury is available. Accordingly, we should now employ

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[13/] The majority avoids the critical issue by pretending the word is "easily comprehended by everyone" and therefore "jurors can be fairly presumed to know and apply such meaning," then faulting appellant for making no showing that guidance to the factfinder on this issue is necessary.

I too have pondered the consequences of the holding I suggest and though I find it unpalatable, it is preferable to having even more capital convictions vacated by the federal courts because of grossly uneven applications of our sentencing procedure down the line. Compare, e.g., Hansett, supra, with Wilder, supra. I would have "the buck stop[] here."

that power reserved to us by the Supreme Court in Jurek,[19] supra, and hold that upon timely request by a capital murder defendant or the State, that party is entitled to have the jury instructed at the punishment phase[20] to the effect of the following:

(1) as employed in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally," as that word was previously defined in the charge on guilt, and

(2) instead, as employed in the first special issue, the word "deliberately" means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision. [21]

In the instant case though the appellant requested it, the jury was not instructed in any fashion upon the meaning of "deliberately" and how it differs from the meaning of "intentionally."

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[19] While it is true, as observed in King, supra, that the United States Supreme Court did not require that we construe particular words and phrases extant in the special punishment issues, that Court intimated the necessity to construe certain words might arise, and reserved that construction for this Court. Jurek, supra, at 271, n. 6.

[20] Article 36.14, V.A.C.C.P., requires:

". . .[I]n each felony case. . . the judge shall, before the argument begins, deliver to the jury, . . . a written charge distinctly setting forth the law applicable to the case;. . . ."

See also Article 36.15, V.A.C.C.P., and compare Williams v. State, 622 S.W.2d 116(Tex.Cr.App. 1981) (wherein the trial court's failure to give instruction at the capital punishment phase was held not reversible error absent an objection or requested instruction).

[21] Webster's New Collegiate Dictionary, G. & C. Merriam Co. (1977).

Having determined such an instruction is essential to the reliability of the jury's arbitration of that issue submitted at punishment in capital cases, I would hold it was prejudicial error to deny such guidance in this case.

To the majority's failure to so hold, I dissent.

CLINTON, Judge

(Delivered

EN BANC

PUBLISH

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, Sept. 28, 1983

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the appellant's Motion for Rehearing in Cause No. 66,410 Clifton Charles Russell, Jr. MANDATE STAYED UNTIL OCTOBER 28, 1983.

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

APPENDIX B

V.T.C.A., Penal Code Section 19.03
Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Vernon's Ann. C.C.P. Art. 37.071
Prodecure in Capital Case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be contrued to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life. The court, the attorney for the state or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

V.T.C.A., Penal Code Section 12.31
Capital Felony

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Vernon's Ann. C.C.P. Art. 35.15
Number of Challenges

(a) In capital cases both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall

be entitled to eight peremptory challenges.

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges. If two or more defendants are tried together, each defendant shall be entitled to six for each defendant.

(c) The State and the defendant shall each be entitled to five peremptory challenges in a misdemeanor tried in the district court and to three in the county court, or county court at law. If two or more defendants are tried together, each defendant shall be entitled to three such challenges and the State to three for each defendant in either court.

V.T.C.A., Penal Code Section 6.03(a)
Definitions of Culpable Mental States

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

V.T.C.A., Penal Code Section 19.02
Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

****

CLIFTON CHARLES RUSSELL, JR.,)

APPELLANT)

V.) NO. 66,410

THE STATE OF TEXAS,)

APPELLEE)

****

APPEALED FROM THE 104TH JUDICIAL

DISTRICT COURT OF

TAYLOR COUNTY, TEXAS

****

JUDGE J. NEIL DANIEL, PRESIDING

****

APPELLANT'S MOTION FOR REHEARING

****

STAN BROWN
P. O. Box 3122
Abilene, Texas 79604
State Bar No. 03145000

ATTORNEY FOR APPELLANT

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

CLIFTON CHARLES RUSSELL, JR., APPELLANT	)	
V.	)	NO. 66,410
THE STATE OF TEXAS, APPELLEE	)	

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Now comes the Appellant, CLIFTON CHARLES RUSSELL, JR., and moves this Honorable Court to set this matter down for rehearing and set aside the Opinion affirming Appellant's conviction delivered July 6, 1983, for the following good and sufficient reasons, to-wit:

I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS.

By Order dated October 17, 1980, this Court denied APPELLANT'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS. The substance of that Motion was as follows:

"Appellant's DESIGNATION OF RECORD ON APPEAL (Tr. 150) requested the inclusion of all pre-trial and trial testimony, together with all instruments filed in the cause. Everything except the Statement of Facts from the individual voir dire

examination of the jurors was requested. The voir dire examination was not requested for the reason that under the then prevailing law as set forth in CHAMBERS V. STATE, 568 SW2d 313, there was no possibility of reversible error from such voir dire examination for the reason that the State exercised only seven of its peremptory challenges and the Defense exercised only eleven of its peremptory challenges. Subsequently, however, this Court held in GRIJALVA V. STATE, 65,174 (614 SW2d 420), decided September 10, 1980, that if a prospective juror is improperly excluded on challenge for cause by the State in a capital case, the fact that the State has peremptory challenges remaining unused at the conclusion of the voir dire does not render such error harmless (overruling CHAMBERS V. STATE, Supra). According to the notes of the undersigned attorney taken during the voir dire examination, there were two prospective jurors who were wrongfully excused for cause upon the challenge of the State based upon those jurors' inability to take the oath required by Section 12.31(B) of the Penal Code. Since the time of such jury selection, the United States Supreme Court in ADAMS V. TEXAS, 65 L Ed2d 581, held that WITHERSPOON V. ILLINOIS, 391 U.S. 510, and Section 12.31(B) may not co-exist as separate and independent bases for excluding jurors so as to permit exclusion under Section 12.31(B) on grounds broader than permitted by WITHERSPOON. As stated, according to the notes of the undersigned

attorney from the voir dire examination in the instant case, such was done. However, due to prior case law as exemplified by CHAMBERS, Supra, such challenges for cause under Section 12.31(B) did not merit any argument on appeal since the State had more than two additional peremptory challenges left. The aforementioned decision in GRIJALVA, Supra, has now made it necessary that Appellant be able to properly present to this Court the complained of error in excusing two jurors for cause under Section 12.31(B). In order to do that, it is necessary that we receive the requested extension of time for filing that portion of the Statement of Facts, which includes the voir dire examination."

As can be seen from the above and foregoing, Appellant had no way of foreseeing the overruling of CHAMBERS and should not be penalized for his failure to initially request the voir dire examination to be included in the Record under the circumstances as heretofore set out. Death by lethal injection would seem to be a rather harsh penalty for such failure under those circumstances, particularly since, to the best of the undersigned attorney's recollection, proper objections were made to the excusing of any juror under Section 12.31(B) of the Penal Code. Appellant submits that this Honorable Court should reconsider its disposition of APPELLANT'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS, order that the

voir dire proceedings in this cause be transcribed and prepared as part of the Record herein and review the same on rehearing in light of the United States Supreme Court decision in ADAMS V. TEXAS, 65 L Ed2d 581. Rather than leaving this matter to the federal courts down the line, the buck should stop here with regard to this question. Cf. RUSSELL V. STATE, No. 66,410, July 6, 1983, Footnote 18, Dissenting Opinion.

II.

THE COURT ERRED IN HOLDING THAT THERE IS NO NECESSITY OF DEFINING THE TERM "DELIBERATELY" UPON REQUEST IN THE INSTRUCTIONS TO THE JURY AT THE PUNISHMENT PHASE OF A CAPITAL TRIAL.

In overruling Appellant's Ground of Error Number 14 concerning the Trial Court's failure to respond to Appellant's requested definition of the term "deliberate", the majority Opinion at Page 17 noted that "Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury." Appellant respectfully disagrees with that analysis, and in support hereof adopts the Dissenting Opinion of Judge Clinton herein as his argument under this paragraph in support of this Motion. It would be presumptuous of Appellant to attempt to expand or improve on the very scholarly and well reasoned analysis of

this question set forth in the Dissenting Opinion. Suffice it to say that while "deliberately" and "intentionally" are certainly not "linguistic equivalents", it no longer makes sense that a capital jury, during the punishment phase, after having found that the defendant intentionally caused the death of an individual will make that fine distinction without the proper guidance of the Court by way of defining the term "deliberately". Moreover, the opinions of the United States Supreme Court in FURMAN V. GEORGIA, 408 U.S. 238; GREGG V. GEORGIA, 428 U.S. 153; PROFFITT V. FLORIDA, 428 U.S. 242; WOODSON V. NORTH CAROLINA, 428 U.S. 280; ROBERTS V. LOUISIANA, 428 U.S. 325; and LOCKETT V. OHIO, 438 U.S. 386, requiring that the factfinder as to the application of the death penalty be provided with sufficient direction and guidance in order to avoid its arbitrary application must now, under the present circumstances, be read as requiring that some suitable definition of the term "deliberately" be provided the jury in order to insure sufficient direction and guidance in order to avoid the arbitrary application of the death penalty. Furthermore, it should not be fatal to our position here that Appellant's requested definition of the term "deliberately" may not have been the exact definition that this Court would require since, according to Footnote 10 of the Dissenting Opinion herein, the basic thrust of our requested charge was in accordance with accepted

definitions of that term. See also, STILES V. STATE, 520 SW2d 894; SLEDGE V. STATE, 507 SW2d 726.

III.

THE COURT ERRED IN HOLDING THAT APPELLANT'S MOTION TO QUASH COUNT ONE OF THE INDICTMENT WAS INSUFFICIENT TO SUPPORT THE ARGUMENT AS TO SAID COUNT FAILING TO NAME THE ALLEGED ROBBERY VICTIM.

In overruling Appellant's Ground of Error Number 1 wherein we contended that the Trial Court erred in failing to quash the Indictment as to Count One for the reason that same fails to provide adequate notice in that said count fails to name the victim of the robbery Appellant was allegedly in the course of committing, the majority Opinion states at Page 10 that "An examination of appellant's motion to quash reflects it was directed to a claim of duplicitous pleading in that two means of causing death were alleged and that it failed to put the appellant on proper notice as to the manner of death. There was no claim therein of failure to name the victim of the robbery." Appellant would respectfully disagree with that analysis. Appellant's Motion to Quash Count One of the Indictment found at Pages 61 and 62 of the Transcript contains four separately numbered paragraphs, each making a different complaint as to Count One of the Indictment. Paragraph I therein does maintain that Count One of the Indictment is duplicitous in that it alleges that Appellant caused the death of an individual

"by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife". On the other hand, Paragraph IV, with which we are involved here, states in full as follows: "Defendant would show the Court that Count One of the Indictment herein fails to provide adequate notice to Defendant in that said count alleges that the Defendant caused the death of an individual 'in the course of committing the offense of robbery', without in any way providing Defendant with notice of the manner in which he allegedly was in the course of committing the offense of robbery. For such lack of notice, Count One of the Indictment should be quashed." While that paragraph, admittedly, does not specifically state that Count One of the Indictment should be quashed for failure to name the alleged robbery victim, it is submitted that a fair reading of it should have adequately called the Trial Court's attention to the omission of the name of the robbery victim. Adequate notice of the manner in which one commits or is in the course of committing a robbery must, of necessity, include the name of the alleged robbery victim. Moreover, existing case law mandates that the relevant language of our Motion to Quash was sufficient here. SWABADO V. STATE, 597 SW2d 361, held that where the defendant's motion to quash the indictment there urged that "the instant indictment, charging defendant with the offense of tampering with a government record,

is vague and ambiguous" was sufficient to call the trial court's attention to the failure of the indictment accusing the defendant there of tampering with a government record to set forth names of certain licensed vocational nurses who were falsely reported as employees and dates on which they were falsely alleged to have worked. Indeed, the dissenting opinion therein, SWABADO, Supra at Page 364, was based on the notion that the motion to quash there was insufficient to point out those deficiencies. The majority there having determined otherwise, however, it must follow that in the instant case our complaint that Count One failed to provide adequate notice in that it failed to provide notice of the manner in which the defendant was allegedly in the course of committing the offense of robbery was surely sufficient. Despite its faults, our complaint in Paragraph IV of the Motion to Quash Count One of the Indictment, was certainly more in line with the argument on appeal under Ground of Error Number 1 than was the language of the Motion to Quash in SWABADO.

IV.

THE COURT ERRED IN FAILING TO CONSIDER APPELLANT'S REASONABLE HYPOTHESIS, SUPPORTED BY THE EVIDENCE, IN ITS DISPOSITION OF APPELLANT'S GROUND OF ERROR NUMBER 5 CONCERNING SUFFICIENCY OF THE EVIDENCE.

In holding that the evidence was sufficient to sustain Appellant's conviction, the Court failed to consider the reasonable hypothesis, supported by the evidence, that Appellant was not involved in the killing. A brief review of some of the

evidence is necessary. Rodney Tobey, deceased's son, on direct examination testified that on December 2, 1979, Hubert Otha Tobey, deceased, was working from 4:00 p.m. to midnight and that he left for work at approximately 3:40 p.m. that day wearing a brown suede jacket (SF 221). Bernard Kastner, Abilene Police Department, testified on direct examination that while on routine patrol on December 3, 1979, he stopped at a convenience store on Washington Boulevard and East Highway 80 in Abilene at approximately 12:50 a.m., and that while stopped at the convenience store, he noticed a silver colored Lincoln Continental parked to the left and described the person standing with the door open by the driver's side of the Lincoln as being a white male with brown curly hair above the collar and wearing a brown jacket or coat (SF 259, 261 through 263). Based on that testimony, the following reasonable hypothesis was argued to the jury at the guilt phase at Page 626 of the Statement of Facts: "But I would submit to you that, based on that, a reasonable hypothesis or possibility or deduction from that evidence certainly is that, from the Minute Stop, however he may have done it, in whatever manner, through whatever trick or what have you, that Battee convinced or somehow got Mr. Tobey to drive him over to 526 Thomas, where he killed him, and that he then went and picked up his friend, Clifton Charles Russell, Jr., who got the blood on him, as we have shown, either by

helping move the body or even through contact with Battee, and that then, through our client's fear, either realizing what he had done by helping to move the body, or even just fear through knowing what Battee had done, that he felt compelled to leave town in that car with Battee." That hypothesis, indicating that the killing was done alone by Battee, is supported by the evidence as we have set forth and we urge that this Court grant this our Motion for Rehearing in order to properly review the sufficiency of the evidence in accordance with the matters set forth herein.

V.

THE COURT ERRED IN FAILING TO CONSIDER THE REASONABLE HYPOTHESIS, SUPPORTED BY THE EVIDENCE, IN ITS DISPOSITION OF GROUND OF ERROR NUMBER 6 CONCERNING SUFFICIENCY OF THE EVIDENCE TO SHOW MURDER DURING THE COURSE OF COMMITTING THE OFFENSE OF ROBBERY.

In disposing of Ground of Error Number 6, the majority Opinion herein merely stated, at Page 9, that "The evidence was sufficient to show a murder committed in the course of a robbery (V.T.C.A., Penal Code, Section 29.02) as alleged." In so doing, the Court failed to consider Appellant's argument advanced under said Ground of Error Number 6 concerning PALAFOX V. STATE, 608 SW2d 177. In that case, the conviction was reversed by this Court as to capital murder, holding that where the State had introduced a confession in which the defendant admitted killing his ex-father-in-law, but which confession

stated that the property was removed from the premises only for the purpose of making it look like the murder had occurred during a robbery, the defendant was entitled to acquittal on the charge of capital murder since the nonconfessional evidence did not show beyond a reasonable doubt that the murder was committed in the course of robbery, rather than as described in the confession. That at most, the nonconfessional evidence made it as likely as not that the murder was in the course of a robbery. That case thus stands for the proposition that if, after causing the death of an individual, a defendant then, as an afterthought, takes that individual's property to create confusion as to the real purpose of the killing, the evidence is insufficient to show that the murder was committed during the course of committing the offense of robbery. A review of the record in the instant case indicates that there is nothing in the evidence here to indicate whether the causing of the death of Hubert Otha Tobey was in any way intertwined with the commission of the offense of robbery or, whether the taking of his vehicle simply occurred as an afterthought or a convenient means of flight from the murder scene. For those reasons, a rehearing must be granted hereon in order to get fair and adequate consideration to our contentions in light of the PALAFOX case.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Honorable Court grant this our Motion for Rehearing and reverse this conviction.

Respectfully submitted,

STAN BROWN
P. O. Box 3122
Abilene, Texas 79604
State Bar No. 03145000

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of July, 1983, a true and correct copy of the above and foregoing was forwarded to the State Prosecuting Attorney and the Criminal District Attorney of Taylor County.

STAN BROWN

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS, duly selected, organized, sworn and impaneled as such for the County of Taylor, State of Texas, at the November Term, 19 79, of the 104th District Court for said County upon their oaths present in and to said Court that on or about the 3rd day of December, A.D. 19 79, and anterior to the presentment of this indictment, in the County and State aforesaid William Battee, Jr., a/k/a Willie Green

did then and there unlawfully, intentionally and knowingly cause the death of an individual, Hubert Otha Tobey, by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife; and the said William Battee, Jr., a/k/a Willie Green did then and there intentionally cause the death of the said Hubert Otha Tobey in the course of committing the offense of robbery,

SECOND COUNT

THE GRAND JURORS AFORESAID, upon their oaths aforesaid in said County and State, at said Term, do further present in and to said Court that on or about the 3rd day of December, 1979, and anterior to the presentment of this Indictment, in the County and State aforesaid, William Battee, Jr., a/k/a Willie Green did then and there intentionally and knowingly cause the death of an individual, Hubert Otha Tobey, by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife,

THIRD COUNT

THE GRAND JURORS AFORESAID, upon their oaths aforesaid in said County and State, at said Term, do further present in and to said Court that on or about the 3rd day of December, 1979, and anterior to the presentment of this Indictment, in the County and State aforesaid, William Battee, Jr., a/k/a Willie Green did then and there intentionally and knowingly, while in the course of committing theft and with intent to obtain and maintain control of property of Hubert Otha Tobey, cause serious bodily injury to Hubert Otha Tobey by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife,

FOURTH COUNT

THE GRAND JURORS AFORESAID, upon their oaths aforesaid in said County and State, at said Term, do further present in and to said Court that on or about the 3rd day of December, 1979, and anterior to the presentment of this Indictment, in the County and State aforesaid, William Battee, Jr., a/k/a Willie Green did then and there while in the course of committing theft and with intent to obtain and maintain property of Hubert Otha Tobey, to-wit: an automobile, one pair of boots, and a credit card, without the effective consent of the said Hubert Otha Tobey and with intent to deprive the said Hubert Otha Tobey of said property, intentionally and knowingly cause serious bodily injury to the said Hubert Otha Tobey by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife,

against the peace and dignity of the State.

STATE OF TEXAS
COUNTY OF TAYLOR
CERTIFIED TO BE A TRUE AND CORRECT COPY
of the Original in My Custody [redacted]
Given Under My Hand and Seal of Office
Dated Dec 19 AD, 19 83
[illegible] ANTHONEY
[illegible] Clerk of Taylor County, Texas
Martha Golds Deputy

Charles W. Awalt Foreman of the Grand Jury

THE STATE OF TEXAS

County of _____

I, _____, Clerk

of the _____ District Court of _____ County, Texas do hereby certify that the within and foregoing is a true and correct copy of the original bill of indictment, filed in said Court on the _____ day of _____, A.D. 19____, in cause No. _____ Styled The State of Texas vs. _____

Given under my hand and seal of said Court, at office in _____ this _____ day of _____, A.D., 19____

_____ Clerk

By _____ Deputy

No 63368

THE STATE OF TEXAS

vs

William Battee, Jr., d/k/a Willie Green

INDICTMENT

OFFENSE

Capital Murder with a second count of Murder (1); with a third count of Aggravated Robbery (1); with a fourth count of Aggravated Robbery (1)

_____ Attorney

A TRUE BILL

_____

Foreman of Grand Jury

FILED

AT _____ O'CLOCK ____ M

DEC 7 1979

IRENE CRAWFORD
DISTRICT CLERK, TAYLOR COUNTY, TEXAS

_____

NAME OF WITNESSES

Jack Dieken

Casey Bradshaw

No. 6326-B

FILED
AT 10:22 O'CLOCK A M
MAY 1 1980
DISTRICT CLERK, TAYLOR COUNTY, TEXAS
DEPUTY

THE STATE OF TEXAS

VS.

WILLIAM BATTEE, JR.

IN THE DISTRICT COURT

TAYLOR COUNTY, TEXAS

WAIVER OF JURY TRIAL

Comes now the Defendant in the above styled and numbered cause, and in open Court makes known that he will enter a Plea of Guilty to the charge herein, and requests the consent and approval of the Court and the Attorney for the State to waive the right to trial by a Jury herein. And the Defendant further waives the ten-day period for trial, after appointment of counsel.

Defendant

Attorney for the Defendant

AGREEMENT TO STIPULATE TESTIMONY

This day, in open Court the Defendant in the above styled and numbered cause and his counsel and the State's Attorney do hereby enter into an agreement that the Defendant waives the appearance, confrontation, and cross-examination of witnesses in this cause and agrees that the testimony of said witnesses may be stipulated into the record by the State's Attorney; such testimony being the same as the witnesses would give if they were present in Court and were testifying under oath, and the Defendant further consents to the introduction of testimony by affidavit, written statements of witnesses, and all other documentary evidence that may be introduced by the State.

Defendant

Attorney for the Defendant

Before the said Defendant enters his Plea herein, each of the above requests of the Defendant herein are hereby consented to, and approved by me, the Attorney representing the State herein.

Assistant District Attorney

The above and foregoing Waiver of Jury Trial and Agreement to Stipulate Testimony of the Defendant herein having been duly considered by the Court, and it appearing to the Court that the Defendant is herein charged with a felony, that the Defendant is represented by counsel, and that the Attorney representing the State herein has given the consent and approval to same, that the Defendant has waived the ten-day waiting period for trial, after appointment of counsel, therefore Consent and Approval of the Court is hereby given to such procedure.

Judge of Said Court

STATE OF TEXAS
COUNTY OF [redacted]
CERTIFIED TO BE A TRUE AND CORRECT COPY
of the Original in My Custody This ____ Page ____
Given Under My Hand and Seal of Office
Dated Oct 24 A.D. 19 83
RILLA MAHONEY
District Clerk of Taylor County, Texas

137 SX1

FILED
AT 10:22 O'CLOCK 4 M
MAY 1 1980
IRENE CRAWFORD
DISTRICT CLERK, TAYLOR COUNTY, TEXAS
Judy Smith DEPUTY

NO. 6326-B

THE STATE OF TEXAS — I
VS. I
WILLIAM BATTEE, JR. I

IN THE 104TH DISTRICT
COURT OF
TAYLOR COUNTY, TEXAS

STIPULATION OF EVIDENCE

COMES NOW WILLIAM BATTEE, JR., the defendant in the above entitled and numbered cause, in writing and in Open Court, and consents to the stipulation of the evidence in this cause and in so doing expressly waives the appearance, confrontation and cross-examination of witnesses. I further consent to the introduction of testimony by affidavits, written statements of witnesses and other documentary evidence. Accordingly, having waived my Federal and State constitutional right against self-incrimination and after having been sworn, upon oath, I judicially confess to the following facts and agree and stipulate that these facts are true and correct and constitute the evidence in this case:

My name is William Battee, Jr., and I am the Defendant in the above entitled and numbered cause. On the 3rd day of December, 1979, I did then and there intentionally and knowingly cause the death of an individual, Hubert Otha Tobey, by beating and hitting him with a piece of concrete and by cutting and stabbing him with a knife.

STATE OF TEXAS
COUNTY OF TAYLOR
CERTIFIED TO BE A TRUE AND CORRECT COPY
of the Original in My Custody ~~Vol~~ ___ Page ___
Given Under My Hand and Seal of Office
Oct 24 A.D. 19 83
Taylor County, Texas
By Martha Cabello

William Battee Jr.
Defendant

SWORN TO AND SUBSCRIBED before me, the undersigned authority on this the 1 day of May, A.D. 19 80.

Irene Crawford
Clerk, District Court
Taylor County, Texas
Judy Smith Deputy

Approved:
Randy Wilson
Attorney for Defendant

Approved by the Court:
Phil Daniel
Judge Presiding

THE STATE OF TEXAS vs. William Battee Jr. a/k/a Willie Green

IN DISTRICT COURT OF Taylor COUNTY, No. 6326-B

104th JUDICIAL DISTRICT OF TEXAS March Term A. D. 19 80

Date May 1, 19 80

This day this cause being again called, the State appeared by her Asst. Criminal District Attorney, Jack Grant and the Defendant, William Battee Jr. a/k/a Willie Green, was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the ~~Verdict and~~ judgment herein rendered and entered against the said Defendant. And thereupon the Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and the Defendant answered nothing in bar thereof, * he having waived time for filing motion for a new trial. Whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him as follows:

It is Ordered by the Court that the Defendant, William Battee Jr. a/k/a Willie Green, who has been adjudged to be guilty of the offense of Murder

be, and is hereby sentenced to confinement in the Texas Department of Corrections for a term of not less than Five (5) nor more than Sixty (60) years, and that the State of Texas do have and recover of said Defendant all costs of this prosecution, for which execution may issue against the property of said Defendant, and that the Defendant be delivered by the Sheriff of Taylor County, Texas, or the authorized agent of the State of Texas, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Defendant shall be confined in the manner and for the period aforesaid.

*It is further Ordered by the Court that the judgment and sentence in this cause shall begin to run from and after the 3 day of December, 19 79, the date the Defendant was placed in jail in this cause.

And the said Defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

J. Neil Daniel
Judge 104th Judicial District of Texas

THE STATE OF TEXAS }
COUNTY OF Taylor } I, Irene Crawford

Clerk of the District Court in and for said County, hereby certify that the above is a true and correct copy of the sentence in the above entitled cause, as appears of record in the Criminal Minutes of said Court in Vol. H, Page 282-81.

WITNESS MY HAND and seal of office at Abilene, TX this 1 day of May, A.D. 19 80

Irene Crawford
Clerk District Court
Taylor County, Texas
By Judy Smid
Deputy

STATE OF TEXAS
COUNTY OF TAYLOR
CERTIFIED TO BE A TRUE AND CORRECT COPY
of the Original in My Custody Vol. H Page 282-81
Given Under My Hand and Seal of Office
Dated Oct 24 AD, 19 83
RILLA MAHONEY
District Clerk of Taylor County, Texas
By [illegible]

THE STATE OF TEXAS } No. 6326-B IN THE DISTRICT COURT OF Taylor COUNTY

vs

William Battee Jr. a/k/a Willie Green } Charge: Capital Murder with a 2nd Ct. of Murder (1) with a 3rd Ct of Agg. Robbery (1) with a 4th Ct. of Agg. Robbery (1) 104th JUDICIAL DISTRICT OF TEXAS.

March TERM A. D. 19 80
May 1, 1980

THIS DAY the above entitled and numbered cause having been called for trial, the State appeared by her Asst. Criminal District R. Jack Grant Attorney, and the Defendant William Battee Jr. a/k/a Willie Green appeared both in person and by counsel Randy Wilson and Aleta Hacker ; and the Defendant , having elected to waive a jury herein and submit all matters of both law and fact to the Court, in person, in open Court duly represented by counsel and upon entering his plea of guilty, requested that a trial by jury be waived and this cause be tried by and before the Court; and the said Attorney representing the State, having properly filed in the papers hereof prior to the entry of the Defendant plea of guilty herein, his consent and approval in writing and written agreement, duly signed, whereby the State agreed that the Defendant be permitted to so waive a jury herein and submit all matters to the Court, and the Court having likewise, also given its consent and approval thereto in writing signed and filed herein, and here now entered in the minutes, a jury was in all things duly waived and this cause tried before the Court.

WHEREUPON, the Defendant having been duly arraigned before the Court and both the State and Defense in open Court having announced ready for trial, the Defendant , in open Court, and in person, properly represented by counsel, pleaded guilty to the charge contained in the Indictment filed herein; thereupon the Court admonished the Defendant of the consequences of said plea of guilty but the Defendant persisted in pleading guilty; and the Defendant plainly appearing to the Court to be sane, and uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting the Defendant to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea of Defendant herein; and after the Attorney representing the State had read the Indictment filed herein in open Court and the Defendant had made the above plea to the same and had been duly admonished of the consequences of the same by the Court, the State proceeded to introduce evidence into the record of this cause showing the guilt of the Defendant ; and the said evidence being accepted by the Court as a basis for its verdict, and the Court considering the same sufficient to support the Defendant plea of guilty and the charge of the Indictment to which the Defendant entered such plea, the Court finds the Defendant to be guilty of the charge in the Indictment filed herein, to which the Defendant entered his plea of guilty and finds the Defendant to be guilty of the offense of

Murder

commited on December 3 1979 .

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant William Battee Jr. a/k/a Willie Green guilty of the offense of Murder as confessed by the Defendant in the Defendant plea of guilty herein made to the Court, and that the said Defendant be punished by confinement in the State Penitentiary for a term of Sixty (60) years, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution may issue.

STATE OF TEXAS
COUNTY OF TAYLOR
CERTIFIED TO BE A TRUE AND CORRECT COPY
of the Original in My Custody Vol. ____ Page ____
Given Under My Hand and Seal of Office
Dated Oct 24 AD, 19 83
RILLA MAHONEY
District Clerk of Taylor County, Texas
By [illegible]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

••

CLIFTON CHARLES RUSSELL, JR.,)

APPELLANT)

V.) NO. _____

THE STATE OF TEXAS,)

APPELLEE)

••

APPEALED FROM THE 104TH JUDICIAL

DISTRICT COURT OF TAYLOR

COUNTY, TEXAS

••

JUDGE J. NEIL DANIEL, PRESIDING

••

APPELLANT'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS

••

STAN BROWN
BOX 3122
ABILENE, TEXAS 79604

ATTORNEY FOR APPELLANT

CLIFTON CHARLES RUSSELL, JR.,)
APPELLANT)
V.) NO. _____
THE STATE OF TEXAS,)
APPELLEE)

APPELLANT'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE APPELLANT, CLIFTON CHARLES RUSSELL, JR., AND RESPECTFULLY MOVES THE COURT OF CRIMINAL APPEALS TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS IN THIS CAUSE AND IN SUPPORT THEREOF WOULD SHOW THE COURT AS FOLLOWS:

I.

THAT CLIFTON CHARLES RUSSELL, JR., APPELLANT, WAS CONVICTED IN THE 104TH DISTRICT COURT OF TAYLOR COUNTY, TEXAS, OF THE FELONY OFFENSE OF CAPITAL MURDER IN CAUSE NO. 6325-B, AND HIS PUNISHMENT WAS ASSESSED AT DEATH.

II.

THE TRIAL OF THIS CAUSE EXTENDED FROM THE 7TH DAY OF APRIL, 1980, UNTIL THE 18TH DAY OF APRIL, 1980.

III.

NOTICE OF APPEAL WAS GIVEN BY THE APPELLANT ON THE 30TH DAY OF APRIL, 1980.

IV.

APPELLANT REQUESTED THE PREPARATION OF THE TRANSCRIPTION OF THE TESTIMONY IN THIS CAUSE ON THE 30TH DAY OF APRIL, 1980.

V.

THE STATEMENT OF FACTS IN THIS CAUSE WAS FILED ON THE 30TH DAY OF JUNE, 1980.

VI.

APPELLANT'S DESIGNATION OF RECORD ON APPEAL (TR. 150) REQUESTED THE INCLUSION OF ALL PRE-TRIAL AND TRIAL TESTIMONY, TOGETHER WITH ALL INSTRUMENTS FILED IN THE CAUSE. EVERYTHING EXCEPT THE STATEMENT OF FACTS FROM THE INDIVIDUAL VOIR DIRE EXAMINATION OF THE JURORS WAS REQUESTED. THE VOIR DIRE EXAMINATION WAS NOT REQUESTED FOR THE REASON THAT UNDER THE THEN PREVAILING LAW AS SET FORTH IN CHAMBERS V. STATE, 568 SW2D 313, THERE WAS NO POSSIBILITY OF REVERSIBLE ERROR FROM SUCH VOIR DIRE EXAMINATION FOR THE REASON THAT THE STATE EXERCISED ONLY SEVEN OF ITS PEREMPTORY CHALLENGES AND THE DEFENSE EXERCISED ONLY ELEVEN OF ITS PEREMPTORY CHALLENGES. SUBSEQUENTLY, HOWEVER, THIS COURT HELD IN GRIJALVA V. STATE, 65,174, DECIDED SEPTEMBER 10, 1980, THAT IF A PROSPECTIVE JUROR IS IMPROPERLY EXCLUDED ON CHALLENGE FOR CAUSE BY THE STATE IN A CAPITAL CASE, THE FACT THAT THE STATE HAS PEREMPTORY CHALLENGES REMAINING UNUSED AT THE CONCLUSION OF THE VOIR DIRE DOES NOT RENDER SUCH ERROR HARMLESS (OVERRULING CHAMBERS V. STATE, SUPRA). ACCORDING TO THE NOTES OF THE UNDERSIGNED ATTORNEY TAKEN DURING THE VOIR DIRE

EXAMINATION, THERE WERE TWO PROSPECTIVE JURORS WHO WERE WRONGFULLY EXCUSED FOR CAUSE UPON THE CHALLENGE OF THE STATE BASED UPON THOSE JURORS' INABILITY TO TAKE THE OATH REQUIRED BY SECTION 12.31(B) OF THE PENAL CODE. SINCE THE TIME OF SUCH JURY SELECTION, THE UNITED STATES SUPREME COURT IN ADAMS V. TEXAS, 65 L Ed2d 581, HELD THAT WITHERSPOON V. ILLINOIS, 391 US 510, AND SECTION 12.31(B) MAY NOT CO-EXIST AS SEPARATE AND INDEPENDENT BASES FOR EXCLUDING JURORS SO AS TO PERMIT EXCLUSION UNDER SECTION 12.31(B) ON GROUNDS BROADER THAN PERMITTED BY WITHERSPOON. AS STATED, ACCORDING TO THE NOTES OF THE UNDERSIGNED ATTORNEY FROM THE VOIR DIRE EXAMINATION IN THE INSTANT CASE, SUCH WAS DONE. HOWEVER, DUE TO PRIOR CASE LAW AS EXEMPLIFIED BY CHAMBERS, SUPRA, SUCH CHALLENGES FOR CAUSE UNDER SECTION 12.31(B) DID NOT MERIT ANY ARGUMENT ON APPEAL SINCE THE STATE HAD MORE THAN TWO ADDITIONAL PEREMPTORY CHALLENGES LEFT. THE AFOREMENTIONED DECISION IN GRIJALVA, SUPRA, HAS NOW MADE IT NECESSARY THAT APPELLANT BE ABLE TO PROPERLY PRESENT TO THIS COURT THE COMPLAINED OF ERROR IN EXCUSING TWO JURORS FOR CAUSE UNDER SECTION 12.31(B). IN ORDER TO DO THAT, IT IS NECESSARY THAT WE RECEIVE THE REQUESTED EXTENSION OF TIME FOR FILING THAT PORTION OF THE STATEMENT OF FACTS WHICH INCLUDES THE VOIR DIRE EXAMINATION.

VII.

APPELLANT HAS NOT PREVIOUSLY REQUESTED ANY EXTENSIONS OF TIME FOR FILING THE STATEMENT OF FACTS IN THIS CASE, APPELLANT'S BRIEF WAS FILED ON AUGUST 8, 1980, AND THE STATE'S BRIEF IS DUE

TO BE FILED, AS A RESULT OF AN EXTENSION OF TIME RECEIVED BY THE STATE, ON NOVEMBER 8, 1980.

WHEREFORE, PREMISES CONSIDERED, APPELLANT RESPECTFULLY REQUESTS THE HONORABLE COURT OF CRIMINAL APPEALS TO EXTEND THE TIME FOR THE FILING OF THAT PORTION OF THE STATEMENT OF FACTS WHICH CONTAINS THE VOIR DIRE EXAMINATION IN THIS CAUSE UNTIL THE 8TH DAY OF NOVEMBER, 1980.

RESPECTFULLY SUBMITTED,

Stan Brown

STAN BROWN
BOX 3122
ABILENE, TEXAS 79604
915-677-1851

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING INSTRUMENT WAS FORWARDED TO OPPOSING COUNSEL IN A MANNER CONSISTENT WITH THE REQUIREMENTS OF LAW ON THE 15 DAY OF OCTOBER, 1980.

Stan Brown

STAN BROWN

COURT OF CRIMINAL APPEALS

OF TEXAS

NO. 80-1118

CLIFTON CHARLES RUSSELL, JR.

VS.

THE STATE OF TEXAS

IN THE 104TH JUD. DIST. COURT

OF TAYLOR COUNTY

TRIAL COURT NO. 6325-B

ON THIS 17TH DAY OF OCTOBER, 1980, CAME ON TO BE CONSIDERED THE MOTION OF THE APPELLANT'S COUNSEL FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE THE TRANSCRIPTION OF THE COURT REPORTER'S NOTES.

AND SUCH MOTION IS HEREBY [redacted]. DENIED.

IT IS SO ORDERED.*

PER CURIAM

*A CERTIFIED COPY OF THIS ORDER SHALL BE MAILED TO THE CLERK OF THE TRIAL COURT WHO SHALL FILE IT WITH THE OTHER PAPERS OF THIS CASE AND WHO SHALL INCLUDE IT IN THE APPELLATE RECORD.

A TRUE COPY ATTEST:

THOMAS LOWE, CLERK
COURT OF CRIMINAL APPEALS

APPENDIX G

NO. 83-5799

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CLIFTON CHARLES RUSSELL, JR.,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ*
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

* Attorney of Record

QUESTIONS PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS COMMITTED ERROR OF CONSTITUTIONAL MAGNITUDE IN DENYING PETITIONER'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS?

II. WHETHER THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN FAILING TO DEFINE THE WORD "DELIBERATELY" AT THE PUNISHMENT PHASE?

III. WHETHER THE CONSTITUTION REQUIRES THAT THE TEXAS DEATH PENALTY SCHEME PROVIDE FOR PROPORTIONALITY REVIEW?

IV. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES?

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NO. 83-5799

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CLIFTON CHARLES RUSSELL, JR.,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is not yet published, is reproduced in Appendix A to the Petition for WRit of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing without written order on September 28, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment of the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .;

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on December 7, 1979, in Harris County, Texas for the murder of Hurbert Otha Tobey, while in the course of attempting to commit robbery. Trial began on April 14, 1980, and on April 17, 1980, the jur found Petitioner guilty of the capital offense. On April 18, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which on July 6, 1983, affirmed the conviction and sentence. Rehearing was denied on September 28, 1983.

STATEMENT OF FACTS

Petitioner's statement of facts of the guilt stage of the trial is essentially correct. The pertinent facts are, however, more comprehensively set out in the opinion of the court below. (See, Appendix A to the Petition for Writ of Certiorari, 1-7).

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of

well-settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's proportionality claim because Petitioner has not presented the precise issue raised herein to the Texas Court of Criminal Appeals.

Petitioner's claim that the court below committed constitutional error in failing to extend his time for filing a transcription of the jury voir dire is without merit. The record clearly reflects that Petitioner failed to comply with Texas law by timely requesting that the transcript be included in the record on appeal. Further, the issue of whether the futility of presenting a claim can alone excuse a failure to comply with existing state procedural requirements has previously been addressed by this Court and rejected in Engle v. Isaac, 456 U.S. 107 (1982).

In Pulley v. Harris, 52 L.W. 4141 (Jan. 23, 1984), this Court held that proportionality review is not constitutionally required in every death penalty case. In so doing, the court expressly reaffirmed the Texas capital sentencing statute.

The issue of whether the Texas capital sentencing statute adequately allows for consideration of mitigating circumstances was previously decided by this Court in Jurek v. Texas, 428 U.S. 262 (1976). Further, this Court has expressly recognized that specific standards for balancing aggravating factors are not constitutionally required.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced

no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S PROPORTIONALITY CLAIM BECAUSE IT WAS NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the Court below. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Store reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and come to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919). Petitioner contends that the Texas death penalty scheme is constitutionally invalid because it fails to provide a procedure for proportionality review, expressly conceding that this contention was not raised in the court below. Thus, Petitioner's claim was not adequately presented to and decided by the state court below.

Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

III.

THE TEXAS COURT OF CRIMINAL APPEALS COMMITTED NO CONSTITUTIONAL ERROR IN DENYING PETITIONER'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS.

Texas law requires that any party who desires to have all or any portion of a transcription of the court reporter's notes included in the record, shall so designate with the clerk in writing and within 20 days of giving notice of appeal. Tex. Code Crim. Proc. Ann. art. 40.09(2)(4) and (5) (Vernon). The state shall file its designation within 30 days after the giving of notice of appeal. Tex. Code Crim. Proc. Ann. art. 40.09(2) (Vernon). After competion of the record, each party is notified by certified or registered mail and is given 15 days after the mailing of such notice to file objections. Tex. Code Crim. Proc. Ann. art. 40.09(7) (Vernon). No objections having been filed, the record is approved and filed with the clerk of the trial court. Tex. Code Crim. Proc. Ann. art. 40.09(8) (Vernon).

The Texas courts have held that the burden is on the criminal defendant to present a complete record of the trial proceedings. Bradley v. State, 564 S.W.2d 727, 730 (Tex.Crim.App. 1978). The notes of the jury voir dire is not a matter that is mandatorily included in the appellate record. Mills v. State, 508 S.W.2d 823 (Tex.Crim.App. 1974); Broussard v. State, 471 S.W.2d 48 (Tex.Crim.App. 1971).

The record reflects and Petitioner concedes that no request was made by Petitioner in compliance with state law to include transcription of the voir dire testimony in the record on appeal

(Tr. 150-51). [1] The record further reflects that on June 30, 1980, [2] Petitioner was notified of the completion of the record (Tr. 153); that no objections were filed by Petitioner; and that the record was approved on July 16, 1980 (Tr. 154-55).

On October 15, 1980, Petitioner filed his "Motion to Extend the Time for Filing a Portion of the Statement of Facts," alleging that at the time he filed his designation of material for inclusion in the record, Adams v. Texas, 448 U.S. 30 (1980), had not been decided and under the existing Texas law, any challenges to the exclusion of two prospective witnesses on the basis of Witherspoon [3] error would have been futile (Petition for Writ of Certiorari, Appendix F). Petitioner's motion was denied by the Court of Criminal Appeals on October 17, 1980 (Petition for Writ of Certiorari, Appendix G).

Petitioner's contention that he was denied effective appellate review through no fault of his own rings hollow in light of the foregoing. Petitioner failed to comply with state law by requesting that a transcription of the jury voir dire be included in the record on appeal and made no objections to the designated record within the time period prescribed by state law.

Further, the question of whether the futility of presenting a claim can alone excuse a failure to comply with existing state procedural requirements was recently addressed by this Court in Engle v. Isaac, 456 U.S. 107, 130 (1982), in the context of applying a procedural default:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to his

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1/ "Tr." refers to the transcript of Petitioner's 1980 trial.

2/ Adams v. Texas, supra, was decided by this Court on June 25, 1980.

3/ Witherspoon v. Illinois, 391 U.S. 570 (1968).

> claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

Petitioner has not presented any claim of constitutional magnitude.

IV.

THE STATE COURT DID NOT COMMIT ERROR OF CONSTITUTIONAL MAGNITUDE IN REFUSING PETITIONER'S REQUESTED JURY INSTRUCTION.

Petitioner contends that the trial court committed constitutional error in failing to define the word "deliberately" in the special issue number one at the punishment stage. He contends that by failing to give the requested instruction, the trial court failed to channel the jury's discretion in determining whether the death sentence should be imposed. Apparently, Petitioner is arguing that by failing to instruct the jury as to the definition of "deliberately", the trial court failed to guide the jury's consideration of the aggravating and mitigating circumstances.

In Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733, 1742 n.13 (1983), this Court reiterated its position in Jurek that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court again recognized that the jury's discretion is channeled by the narrowing categories of murders for which the death sentence may be imposed. Respondent submits that Petitioner's claim of constitutional error is meritless.

V.

PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY MANDATED.

The question of whether the Constitution requires the Texas death penalty scheme to provide proportionality review has recently been addressed by this Court. In Pulley v. Harris, 52 L.W. 4141 (Jan. 23, 1984), this Court held that comparative proportionality review is not constitutionally required in every

case in which the death penalty is imposed and the defendant requests it. In so holding, the Court expressly reaffirmed the validity of the Texas capital sentencing procedure, expressly noting:

> Texas' capital sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. [Jurek v. Texas, 428 U.S. 262, 276 (1976)].

52 L.W. at 4144. Petitioner's claim that proportionality review is constitutionally mandated is without merit.

VI.

THE ISSUE OF WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES WAS SETTLED BY THIS COURT IN JUREK V. TEXAS, 428 U.S. 262 (1976).

In Jurek v. Texas, 428 U.S. 262 (1976), this Court upheld the Texas capital-sentencing statute against constitutional attacks under the Eighth and Fourteenth Amendments. The Court held that because Texas has severely limited the statutory offenses for which capital punishment might be imposed to offenses involving at least one aggravating circumstance, has allowed for mitigating circumstances relating to the individual defendant at the punishment stage, and has provided for prompt judicial review, "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under the law" and the "system serves to assure that sentences of death will not be 'wantonly' or 'freakishly'

imposed." Id. at 276. With respect to the special issue number two, Jurek held:

> The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death . . . In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:
>
> > "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."
>
> . . .
>
> Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

428 U.S. at 272-73, 92 S.Ct. at 2956-57 (citation omitted).

Petitioner's contention that the sentencing body was precluded from hearing mitigating evidence because the Texas Court of Criminal Appeals failed to discuss the mitigating factors in addressing whether the second special issue is constitutionally vague and whether the evidence is sufficient to support the affirmative finding as to the probability of future criminal acts of violence is frivolous. The record reflects and Petitioner concedes that Petitioner presented evidence to the jury at the punishment phase of Petitioner's lack of any prior criminal history, his age and his childhood background.

(Petition for Writ of Certiorari at 5-10, 27). Petitioner completely fails to allege or demonstrate any mitigating evidence which the trial court precluded the defense from presenting to the jury or any evidence that the trial court refused to consider. His reliance on Eddings v. Oklahoma, 455 U.S. 104 (1982) is misplaced.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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